Volume 6, No. 10, Pages 2454 to 2786, May 6 - May 17, 1991.

FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

James H. Quello

Sherrie P. Marshall

Andrew C. Barrett

Ervin S. Duggan

The contents of this document are subject to correction by means of an erratum appearing at a future date in the FCC Record. Users should notify the Secretary of errors so that an erratum can be inserted in a later publication.

The appropriate citation for documents printed in the FCC Record should include the volume number, page number, and year. See 47 C.F.R. §1.14. Earlier Commission documents may continue to be cited to the FCC Reports.

Citation Form: 6 FCC Rcd 1 (1991)

United States Government Printing Office • Washington, D.C.

For Sale by the Superintendent of Documents, U.S. Government Printing Office
on a subscription basis

Federal Communications Commission Record

Volume 6
Issue 10

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... x

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 2454

Federal Communications Commission Record

Table of Cases
Volume 6
Issue 10

Case Name	Page
1991 Annual Access Tariff Filings	2632
Agana Guam FM Radio Limited Partnership	2469
Albert, Marc A.	2603
Allnet Communication Services, Inc.	2608
American Telephone & Telegraph Co.	2552
American Telephone and Telegraph Company	2567
Automatic Transmitter Identification System	2470
Baldwin, Bruce W.	2571
BankAmerica Corporation	2588
Bell Atlantic Operating Companies	2542
Boedker, Rebecca L.	2557
Clarksville Radio	2505
Dial-Net, Inc.	2490
Direct Broadcast Satellite Service	2581
Dontron, Inc.	2560
Federal/State Joint Conference on Open Network Architecture	2631
Fee Decisions of the Managing Director	2553
Florida Region Public Safety Plan	2607
Fox Broadcasting Company	2622
Frederick & Warinner	2483
Halpert and Company, Inc.	2548
IDB Aeronautical Communications, Inc.	2485
Integration of Rates and Services	2630
Interstate 900 Telecommunications Services	2589
Kelley, Oliver and Mary Ann	2513
Madalina Broadcasting, Inc.	2508
Miscellaneous Amendments to Part 80 - Maritime Radio Services	2478
Mobilfone Service, Inc.	2551
Nevada Bell	2495
O'Neill, Brian L.	2572
Operator Service Providers	2744
OrionNet, Inc.	2547
Peel, William F., Jr.	2501
Poughkeepsie Broadcasting Limited	2497
Preemption of Local Zoning of Satellite Earth Stations	2600
Price, David R.	2585
Pruitt, Inc.	2475
Rancho Mirage Radio, A General Partnership	2523
Rates for Dominant Carriers	2637
Real Life Educational Foundation of Baton Rouge, Inc.	2577
Rish, Benito, M.D.	2628
Root, Thomas L., Esquire	2491

Case Name	Page
Royce International Broadcasting	2601
Sarkes Tarzian, Inc.	2465
Southwestern Bell Telephone Company	2569
Spann, Darrell	2596
Spousal Attribution	2492
Sunshine Broadcasting, Inc.	2613
Table of Allotments, FM, Appomattox, VA	2623
Table of Allotments, FM, Banks, OR	2462
Table of Allotments, FM, Boonville and Columbia, MO	2535
Table of Allotments, FM, Burlington, IA and Hamilton, IL	2458
Table of Allotments, FM, Holbrook, AZ	2454
Table of Allotments, FM, Ilwaco, WA	2460
Table of Allotments, FM, Kings, MS	2471
Table of Allotments, FM, Lake Havasu City, AZ	2456
Table of Allotments, FM, Lemoore and Tipton, CA	2593
Table of Allotments, FM, Neenah-Menasha, WI	2473
Table of Allotments, FM, Nephi, UT	2537
Table of Allotments, FM, Saltville, VA and Jefferson, NC	2594
Table of Allotments, FM, Santa Rosa and Tucumcari, NM	2592
Table of Allotments, FM, Waldron, AR	2590
Table of Allotments, FM, Whiting, DePere, Crandon and Algoma, WI	2624
Table of Allotments, FM, Wickenburg, AZ	2540
Table of Allotments, TV, Wailuku, HI	2538
Tri-State Broadcasting Company, Inc. (KUKQ(AM))	2604
US Sprint Communications Company Limited Partnership	2546
WCCR Broadcasting Limited Partnership	2554
Western Radio Services Company, Inc.	2463
Western Union International, Inc.	2570
White Stone Broadcasting Company	2500
Willis Broadcasting Corporation	2598

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 6
Issue 10

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 91 - 385	2475	DA 91 - 568	2552
DA 91 - 386	2500	DA 91 - 569	2570
DA 91 - 387	2501	DA 91 - 570	2588
DA 91 - 388	2505	DA 91 - 571	2589
DA 91 - 389	2508	DA 91 - 572	2590
DA 91 - 402	2554	DA 91 - 573	2592
DA 91 - 462	2598	DA 91 - 574	2593
DA 91 - 473	2596	DA 91 - 575	2594
DA 91 - 511	2632	DA 91 - 576	2607
DA 91 - 531	2454	DA 91 - 577	2600
DA 91 - 532	2456	DA 91 - 579	2631
DA 91 - 533	2458	DA 91 - 580	2623
DA 91 - 534	2460	DA 91 - 586	2624
DA 91 - 535	2462	FCC 91 - 100	2608
DA 91 - 541	2571	FCC 91 - 107	2478
DA 91 - 542	2483	FCC 91 - 115	2637
DA 91 - 545	2569	FCC 91 - 116	2744
DA 91 - 549	2470	FCC 91 - 124	2491
DA 91 - 550	2540	FCC 91 - 125	2601
DA 91 - 551	2538	FCC 91 - 126	2492
DA 91 - 552	2537	FCC 91 - 137	2465
DA 91 - 553	2535	FCC 91 - 138	2585
DA 91 - 554	2471	FCC 91 - 139	2497
DA 91 - 555	2473	FCC 91 - 140	2581
DA 91 - 556	2463	FCC 91 - 143	2557
DA 91 - 557	2560	FCC 91 - 144	2572
DA 91 - 558	2485	FCC 91 - 147	2628
DA 91 - 559	2490	FCC 91 - 148	2603
DA 91 - 560	2542	FCC 91 - 149	2622
DA 91 - 561	2567	FCC 91 - 151	2604
DA 91 - 562	2546	FCC 91 - 153	2630
DA 91 - 563	2547	FCC 91D - 20	2469
DA 91 - 564	2495	FCC 91D - 22	2513
DA 91 - 565	2548	FCC 91D - 23	2523
DA 91 - 566	2553	FCC 91D - 25	2613
DA 91 - 567	2551	FCC 91R - 39	2577

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 6
Issue 10

Docket Number				Page
CC	Dkt.No.83	-	1376	2630
CC	Dkt.No.87	-	313	2637
CC	Dkt.No.90	-	313	2744
CC	Dkt.No.91	-	65	2589
GEN	Dkt.No.90	-	119	2607
GEN	Dkt.No.90	-	297	2491
MM	Dkt.No.85	-	355	2604
MM	Dkt.No.87	-	28	2601
MM	Dkt.No.88	-	279	2497
MM	Dkt.No.88	-	304	2557
MM	Dkt.No.88	-	308	2577
MM	Dkt.No.88	-	401	2513
MM	Dkt.No.89	-	188	2592
MM	Dkt.No.89	-	249	2590
MM	Dkt.No.89	-	282	2624
MM	Dkt.No.89	-	311	2603
MM	Dkt.No.89	-	355	2581
MM	Dkt.No.90	-	10	2523
MM	Dkt.No.90	-	43	2613
MM	Dkt.No.90	-	349	2469
MM	Dkt.No.90	-	462	2462
MM	Dkt.No.90	-	482	2593
MM	Dkt.No.90	-	609	2537
MM	Dkt.No.91	-	8	2623
MM	Dkt.No.91	-	86	2501
MM	Dkt.No.91	-	96	2475
MM	Dkt.No.91	-	98	2505
MM	Dkt.No.91	-	99	2500
MM	Dkt.No.91	-	100	2508
MM	Dkt.No.91	-	101	2554
MM	Dkt.No.91	-	122	2492
MM	Dkt.No.91	-	125	2598
MM	Dkt.No.91	-	126	2596
MM	Dkt.No.91	-	128	2454
MM	Dkt.No.91	-	129	2456
MM	Dkt.No.91	-	130	2460
MM	Dkt.No.91	-	131	2471
MM	Dkt.No.91	-	132	2473
MM	Dkt.No.91	-	133	2540
MM	Dkt.No.91	-	134	2538
MM	Dkt.No.91	-	135	2535
MM	Dkt.No.91	-	136	2585
MM	Dkt.No.91	-	137	2594
MM	Dkt.No.91	-	533	2458
PR	Dkt.No.91	-	111	2478

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 6
Issue 10

Rulemaking Number	Page
RM - 4436	2630
RM - 6630	2624
RM - 6767	2744
RM - 6936	2592
RM - 7002	2624
RM - 7003	2624
RM - 7004	2624
RM - 7172	2593
RM - 7299	2623
RM - 7467	2462
RM - 7494	2594
RM - 7500	2458
RM - 7542	2537
RM - 7593	2460
RM - 7614	2458
RM - 7664	2456
RM - 7692	2473
RM - 7694	2454
RM - 7697	2535
RM - 7702	2471
RM - 7708	2538
RM - 7710	2540

Table of Cases by City
Volume 6
Issue 10

City/State	Page	City/State	Page
Algoma, WI	2624	Lemoore, CA	2593
Appomattox, VA	2623	Neenah-Menasha, WI	2473
Austin, NV	2495	Nephi, UT	2537
Banks, OR	2462	Nolanville, TX	2513
Boonville, MO	2535	Northumberland, PA	2557
Burlington, IA	2458	Panama City, FL	2572
Campbellsville, KY	2475	Poughkeepsie, NY	2497
Clarksville, IN	2505	Ranch Mirage, CA	2523
Columbia, MO	2535	Redmond, OR	2463
Crandon, WI	2624	Reno, NV	2465
DePere, WI	2624	Sacramento, CA	2601
East Point, GA	2598	Saltville, VA	2594
Haltom City, TX	2508	Santa Rosa, NM	2592
Hamilton, IL	2458	Syracuse, NY	2603
Hammond, IN	2560	Tempe, AZ	2604
Hartsville, SC	2613	Tipton, CA	2593
Holbrook, AZ	2454	Tucumcari, NM	2592
Ilwaco, WA	2460	Wailuku, HI	2538
Jackson, MS	2585	Waldron, AR	2590
Jacksonville, FL	2596	Whippany, NJ	2571
Jefferson, NC	2594	White City, FL	2501
Kings, MS	2471	White Stone, VA	2500
Lake Havasu City, AZ	2456	Whiting, WI	2624
Leland, NC	2554	Wickenburg, AZ	2540
		Yonkers, NY	2628

Federal Communications Commission Record

Subject Index
Volume 6
Issue 10

Subject	Page
Access Charges	
Net investment, apportionment of	
Net investment	2483
Revenue requirements, computation of	2483
Adjudication	
Burden of proof	2513, 2523
Civic participation	2513, 2523, 2613
Exceptions	2513
Administrative Law Judge Decision	
Character qualifications	2604
Financial qualifications	2603
Integration of ownership (qualitative), local residence	2557
Integration of ownership into management, qualitative	2557, 2497, 2601
Limited partnership	2497, 2601
Misrepresentation and lack of candor	2604
Noncommercial educational	2577
Renewal expectancy	2601
Reopening of record	2604
Orders or Notices	
Lottery to select licensee	2475, 2508, 2500, 2554, 2598, 2596
Partnership	2513, 2613
Broadcast Radio Services - General Rules	
Applications for authorization	
Grant of an application can be made without a hearing	2560
Public inspection file of commercial stations, local	2560
Equipment	
Antenna structure, marking and lighting of	2585
General information	
Written statements of fact, the Commission may require	2585
Licenses and permits	
Filing of contracts with FCC, provisions concerning	2628
Multiple ownership of broadcast stations in the same service	2492
Operating hours	
Discontinuation	2585
Program contents	
Contests	2560
Sponsorship identification	2560
Records kept by stations	
Equal employment opportunity program	2560

Subject	Page
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	2471, 2473, 2454, 2456, 2458, 2460, 2462, 2590, 2592, 2593, 2594, 2535, 2537, 2540, 2623, 2624
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Distance separations between stations, minimum	2465
Table of assignments	2538
Services	
Affiliations; network program practices; territorial exclusivity	2622
Carriers: Service Altered	
Discontinuance/reduction/impairment	
Public coast station, applications to close/reduce service at	2551
Extensions and supplements	
Applications, contents of	2490, 2485, 2546, 2547, 2552
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	2569, 2567
Communications Act of 1934	
Common Carriers	
Complaints to the commission	2608
Extension of lines, certificate for	2490, 2485
Service and charges	2608
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	2628
Radio, provisions relating to	
Applications;form of and conditions attached to licenses	2485
Commission, general powers of	2585
Construction permits	2485
Licenses, limitation on holding and transfer of	2628
Sanctions, administrative	2585
Direct Broadcast Satellite Service (DBS)	
General information	
Definitions	2581
Frequency Allocations and Radio Treaty Matters	
Equipment authorization procedures: application procedures	
Hearing based on questions about applicant/equipment/use	2572

Subject	Page
Maritime Services	
Frequencies	
Radiodetermination stations, table for	2478
Technical standards for coast and ship stations	
Frequency tolerances/bands/categories of stations, table of	2478
Practice and Procedure	
Common carriers: tariffs	
Filing, petitions related to new	2632
Hearing proceedings: hearing and intermediate decision	
Hearing and burden of proof, full	2604
Information, general	
Declaratory rulings	2483
Parties, practitioners, witnesses	
Censure/suspension/disbarment of persons who appear before FCC	2491
Proceedings, miscellaneous	
Forfeiture proceedings	2572
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	2603
Public Mobile Service	
Applications and licenses-processing	
Grants by random selection	2463
Mutually exclusive applications	2463
Station authorization, transfer of control/assignment of	2572
Statutory Citations Other than Communications	
Administrative Procedure	
Costs and fees of parties	2491

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 authority delegated	2567
000.291 delegated authority	2569
001.002 Declaratory rulings	2483
001.024 Censure, suspension on disbarment of attorneys	2491
001.080 Forfeiture proceedings	2572
001.115 Application for review of action taken pursuant	2603
001.254 Nature of the hearing; burden of proof	2604
021.707 Stations at temporary fixed locations.	2495
022.031 Mutually exclusive applications	2463
022.033 Grants by random selection	2463
022.039 Transfer of control or Assign. of Station Auth.	2572
022.921 Ownership in Appl. for Cellular Service for markets	2572
032.014 Regulated Accounts	2542
032.023 Nonregulated Activities	2542
063.001 Contents of Application	2490
063.001 Contents of Application	2546
063.001 Contents of Applications	2485
063.001 Contents of Applications	2547
063.001 contents of applications	2552
063.069 Contents of Application to close/reduce hrs.of publi	2551
064.901 Allocation of Costs	2542
069.301 General	2483
069.302 Net investment	2483
069.309 Other investment	2483
069.602 Board of Directors	2571
069.605 Reporting and distribution of pool access revenues	2571
073.1015 Truthful written statements and responses to Commis	2585
073.1212 Sponsorship identification; list retention; related	2560
073.1213 Antenna structure, marking and lighting	2585
073.1216 Licensee-conducted contests	2560
073.1750 Discontinuance of operation	2585
073.202 FM Table of Allotments	2454
073.202 FM Table of Allotments	2456
073.202 FM Table of Allotments	2458
073.202 FM Table of Allotments	2460
073.202 FM Table of Allotments	2462
073.202 FM Table of Allotments	2471
073.202 FM Table of Allotments	2473
073.202 FM Table of Allotments	2535
073.202 FM Table of Allotments	2537
073.202 FM Table of Allotments	2540
073.202 FM Table of Allotments	2590
073.202 FM Table of Allotments	2592
073.202 FM Table of Allotments	2593
073.202 FM Table of Allotments	2594
073.202 FM Table of Allotments	2623
073.202 FM Table of Allotments	2624
073.2080 Equal employment opportunities	2560
073.3526 Local public inspection file of commercial stations	2560
073.3555 Multiple Ownership	2492

073.3591 Grants without hearing 2560
073.3613 Filing of contracts regarding control or management 2628
073.606 TV Table of Allotments 2538
073.610 Minimum distance separation 2465
073.658 Affiliation agreements and network program practices 2622
076.501 Cross-ownership 2492
080.209 Transmitter frequency tolerance 2478
080.375 Radiodetermination frequencies 2478
100.003 Definitions 2581
100.021 Technical requirements 2581
300.201 Service and Charges 2608
300.208 Complaints to the Commission 2608
300.214 Extension of Lines 2485
300.214 Extension of Lines 2490
300.214 Extension of Lines 2546
300.214 Extension of Lines 2547
300.214 Extension of Lines 2551
300.214 Extension of lines 2552
300.220 Accounts, Records, and Memoranda; Depreciation Charg 2571
300.303 General Powers of Commission 2585
300.309 Action Upon Applications; Form of/Conds. attached to 2485
300.310(d) Unauthorized Transfer of Control 2628
300.312 Administrative Sanctions 2585
300.319 Construction Permits 2485
300.503(b) Forfeitures (Notice of Apparent Liability) 2628
400.05504 Costs and fees of parties 2491
47 C. F. R. § 64.702, Furnishing of Enhanced Services and C 2631
47 C.F.R. 0.291 delegated authority 2632
47 U. S. C. § 410, Use of Joint Boards--Cooperation w/State 2630
500.030 - Integration Qualitative 2513
500.030 - Integration, Qualitative 2523
500.035 - Integration Quantitative 2513
500.035 - Integration, Quantitative 2523
500.035 - Integration, Quantitative 2613
500.065 - Comparative Coverage 2513
500.100 HDO 2475
500.100 HDO 2500
500.100 HDO 2501
500.100 HDO 2505
500.100 HDO 2508
500.100 HDO 2554
500.100 HDO 2596
500.100 HDO 2598
500.125 - Misrepresentation and Lack of Candor 2513
500.125 - Misrepresentations 2613
500.170 - Financial Qualifications 2613
500.2180 Site Availability or Suitability 2469
500.3005 Integration of ownership, qualitative aspect 2557
500.3015 Integration of ownership, civic participation 2557
500.3025 Integration of ownership, local residence 2557
500.3040 integration of ownership into management, questions 2497
500.3040 integration of ownership into management, questions 2601
500.3080 renewal expectancy 2601
500.3090 Noncommercial Comparative Licensing, Coverage 2577

500.3095 character qualifications 2604
500.3125 misrepresentation and lack of candor 2604
500.3170 Financial qualifications 2603
500.3200 reopening of record 2604
500.3220 limited partnership 2497
500.3220 limited partnership 2601
Section 0.291 delegated authority 2570
§69.54(j) Rates and General Rules, Regulations, ... 2548

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-128

In the Matter of

Amendment of Section 73.202(b), RM-7694
Table of Allotments,
FM Broadcast Stations.
(Holbrook, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 23, 1991; Released: May 6, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Navajo Broadcasting Company, Incorporated ("petitioner"), permittee of Channel 221A, Holbrook, Arizona, requesting the substitution of Channel 221C1 for Channel 221A and modification of its construction permit (BPH-890118MF) to specify operation on the higher powered channel. Petitioner states that the substitution of channels would permit it to provide an expanded coverage area FM service to Holbrook and its environs. Petitioner provided the requisite commitment to apply for Channel 221C1 if it is allotted to Holbrook.

2. Additionally, petitioner asserts, and our engineering anlaysis confirms, that the 1 mV/m contour of requested Channel 221C1 at Holbrook does not lie within the Grade B contour of any television Channel 6 station.[1]

3. We believe the public interest would be served by proposing the substitution of Channel 221C1 for Channel 221A at Holbrook since it could provide an expanded coverage area FM service to the community. A staff analysis of the proposal reveals that Channel 221C1 can be allotted to Holbrook in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules without the imposition of a site restriction, as demonstrated by the petitioner.[2] We will propose to modify the petitioner's construction permit (BPH-890118MF) as requested to specify operation on Channel 221C1. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 221C1 at Holbrook, nor require the petitioner to demonstrate the existence of an additional equivalent class channel for use by such parties.

4. Accordingly, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Holbrook, Arizona	221A	221C1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 27, 1991,** and reply comments on or before **July 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John M. Pelky, Esq.
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Commission, in amending its rules to permit higher powered operation on Channel 221A, expressed its concern that such potential upgrades not adversely affect the continued availability of noncommercial educational service in channel 6 television markets. Thus, where the Grade B contour of a TV channel 6 station and the 1 mV/m signal contour of a proposed upgraded facility on Channel 221 would overlap, a petitioner seeking such modification must demonstrate that a grant of its request is in the public interest. *See First Report and Order*, MM Docket No. 86-144, 52 Fed. Reg. 8259, published March 17, 1987.

[2] Coordinates for Channel 221C1 at Holbrook are 34-54-12 and 110-09-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-129

In the Matter of

Amendment of Section 73.202(b),	RM-7664
Table of Allotments,	
FM Broadcast Stations.	
(Lake Havasu City, Arizona)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 23, 1991; Released: May 6, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Bridge Broadcasting ("petitioner"), seeking the allotment of FM Channel 244C2 to Lake Havasu City, Arizona, as that community's fourth local FM service. Petitioner stated its intention to apply for Channel 244C2 if allotted to Lake Havasu City.

2. We believe the public interest would be served by proposing the allotment of Channel 244C2 to Lake Havasu City, Arizona, since it could provide the community with an additional local FM service. Channel 244C2 can be allotted to Lake Havasu City in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[1] However, since Lake Havasu City is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of the Mexican government in the proposal.

3. Accordingly, we believe it is appropriate to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Lake Havasu City, Arizona	266C,286C2	244C2,257C2,[2] 266C,283C2[3]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 27, 991,** and reply comments on or before **July 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner and its consultant, as follows:

Bridge Broadcasting	Larry G. Fuss
Attn: Hillary Sosey	Contemporary
2284 Casper Lane	Communications
Lake Havasu City, AZ 86403 (Petitioner)	and P.O. Box 159 Fayetteville, GA 30214 (Consultant)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates used for Channel 244C2 at Lake Havasu City are 34-29-02 and 114-19-18.

[2] A counterproposal (RM-6623) in MM Docket No. 88-490 proposes the allotment of Channel 257C2 to Lake Havasu City.

[3] Channel 283C2 has been proposed as a substitute for Channel 286C2 at Lake Havasu City in MM Docket No. 90-468. *See* 5 FCC Rcd 6271 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-511

Amendment of Section 73.202(b),	RM-7500
Table of Allotments,	RM-7614
FM Broadcast Stations.	
(Burlington, Iowa and	
Hamilton, Illinois)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 23, 1991; Released: May 6, 1991

By the Chief, Allocations Branch:

1. At the request of John M. Giannettino ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6551 (1990), proposing the allotment of Channel 276C3 to Burlington, Iowa, as the community's third local FM service. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. Riverbend Radio ("Riverbend") filed and subsequently withdrew a counterproposal requesting the allotment of Channel 276B at Hamilton, Illinois, as the community's first local FM service.[2] LWM, Inc. ("LWM") filed comments opposing the proposal, and petitioner filed reply comments.

2. In its comments, LWM notes that petitioner is the licensee of KCPS(AM) in Burlington. LWM contends that Station KCPS(AM) is not a "daytime station" as the petitioner claimed in his petition for rule making. It argues that petitioner is not undergoing any "hardship of being a daytime facility" because his AM station is actually operating as a full-time facility. LWM maintains that petitioner's contradictory statements must disqualify him from obtaining an FM allotment. In support of its contention, LWM states that the Commission advised petitioner that he could operate KCPS(AM) at night pursuant to an Order to Show Cause, issued on November 18, 1987, and advised him that his license would be modified to specify nighttime operation unless objected to on or before February 23, 1988. LWM argues that petitioner did not file an objection. Further, LWM argues, petitioner failed to send the Commission required notification before nighttime operation could begin.

3. LWM also argues that petitioner may be claiming daytime status in preparation for future claim for enhancement credit available under certain circumstances to daytime-only AM licensees in the comparative hearing stage, citing *Memorandum Opinion and Order, Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 59 RR 2d 1221 (1986), and *Memorandum Opinion and Order, Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignments*, 61 RR 2d 1704 (1987), *aff'd* 63 RR 2d 1 (1987). According to these decisions, LWM contends, no daytime-only AM enhancement credit is available to those AM licensees seeking FM permits if they operate at night with 250 watts or more or have been authorized by the Commission to do so. LWM supports, with affidavits, that Station KCPS(AM) operates as a full-time station broadcasting in the daytime and nighttime hours with a power of 500 watts, and that a promotional statement to local advertisers represents that Station WCPS(AM) broadcasts "24 hours per day seven days per week." LWM submits Field Strength Readings of Station KCPS(AM)/1150 which show meter readings of the strength of the station's signal that suggest that the station is operating in excess of authorized power. These contradictory representations, LWM contends, reveal a lack of candor and an outright misrepresentation which reflect upon petitioner's credibility and qualifications to be a licensee. A licensee, LWM states, has a special obligation as the trustee of a scarce public resource to be scrupulous in providing complete and meaningful information to the Commission, and fully forthcoming as to all relevant facts and information, citing *Fox River Broadcasting, Inc.* 88 FCC 2d 1132, 1137 (1982), *modified*, 93 FCC 2d 127 (1983) (quoting *Lorain Journal Co.* v *FCC*, 351 F.2d 824, 830 (D.C. Cir. 1965)); and *Silver Star Communications-Albany, Inc.*, 3 FCC Rcd 6342, 6349 (Rev. Bd. 1988). This obligation arises because the Commission must rely on licensee's representations in order to provide validity to its processes, citing *Fox River*, 93 FCC 2d at 130 (citing *Leflore Broadcasting Co.* v. *FCC*, 636 F.2d 454 (D.C. Cir. 1980)). LWM concludes that petitioner was less than candid with the Commission when he petitioned for a rule making to allot Channel 276C3 to Burlington, Iowa, and the Commission should not reward evasiveness and lack of candor by allotting an additional FM channel to Burlington, and that the petitioner's statements may indeed rise to the level of misrepresentations before the Commission.

4. In reply, petitioner argues that LWM's comments were not directed to the proposed rule making as requested by the Commission and that the only comments were inaccurate claims about his credibility. Petitioner states he was completely candid and forthright in his application regarding status as an "AM daytime" station, and that daytime-only stations often have nighttime authorization at minimal power, at the discretion of the Commission. However, petitioner contends, that nighttime authorization is extremely limited and does not change the license status from "daytime" to "full-time." Petitioner argues that KCPS(AM) is in fact a daytime station and is authorized by the Commission to operate 67 watts at night, which is well below the 250 watt limitation, and that LWM is incorrect in its comments that KCPS(AM) is operating 500 watts full-time. Moreover, petitioner states LWM's Field Strength Readings are entirely incorrect and misleading because readings taken from miscellaneous points not near radials, at haphazard locations at various times, can yield misleading readings. Petitioner also contends that KCPS(AM) is operating at exactly the power authorized by the Commission, and that LWM's assertion that it is operating at greater than licensed power is incorrect. Finally, petitioner states that he was forthright and accurate in his application, that he has owned and operated Station KCPS(AM) for three years, and that he has been granted license renewal for the station. Therefore, petitioner contends that LWM's negative comments are created to stall, delay and thwart potential competition, and that the status of the license for Station KCPS(AM) is not in question in this proceeding.

5. We find LWM's contentions of lack of candor and misrepresentations by the petitioner have no basis in fact because the license granted to Station KCPS(AM) included the nighttime authorization, granted prior to petitioner's license date. Pursuant to Section 73.99(e) of the Commission's Rules, nighttime service authority permits operation on a secondary basis and does not confer license rights. Thus, this authority does not change petitioner's designation as a "daytime" station. Furthermore, Station KCPS(AM) is, apparently, operating at the power authorized by the Commission. LWM's claim that KCPS(AM) is operating in excess of authorized power is inconclusive. The excessive readings, particularly at the 1/2 mile distance, may be the result of anomalous close in values that cause signal blanketing.

6. Therefore, we believe the public interest would be served by the allotment of Channel 276C3 at Burlington, Iowa, since it would provide the community with its third local FM service. Channel 276C3 can be allotted to Burlington in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Burlington, Iowa	228A, 276C3, 297C1

8. The window period for filing applications will open on **June 21, 1991,** and close on **July 22, 1991.**

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Hamilton has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given February 7, 1991, Report No. 1836. In accordance with Section 1.420(j) of the Commission's Rules, Riverbend submitted a declaration that it has not received or been promised any consideration for the withdrawal of its counterproposal.

[3] The coordinates were incorrect in the *Notice*. The correct coordinates for Channel 276C3 at Burlington are North Latitude 40-48-27 and West Longitude 91-06-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-130

In the Matter of

Amendment of Section 73.202(b), RM-7593
Table of Allotments,
FM Broadcast Stations.
(Ilwaco, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 23, 1991; Released: May 6, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Michael T. McKenna ("petitioner"), requesting the allotment of Channel 297C3 to Ilwaco, Washington, as the community's first local FM transmission service.[1] Petitioner states he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 297C3 to Ilwaco, Washington, since it could provide the community with its first local FM transmission service. Channel 297C3 can be allotted to Ilwaco in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.7 kilometers (7.9 miles) west of the community to avoid a short-spacing to the proposed allotment of Channel 296C3 at Castle Rock, Washington.[2] Since Ilwaco is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ilwaco, Washington	--	297C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 27, 1991,** and reply comments on or before **July 12, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Michael T. McKenna
P.O. Box 90277
Long Beach, California 90809
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] This petition was originally filed as a counterproposal in MM Docket No. 90-462. Because it was not a mutually exclusive proposal, it was not considered in that proceeding. However, on our own motion, we have issued this *Notice.*

[2] The coordinates for Channel 297C3 at Ilwaco are North Latitude 46-18-26, West Longitude 124-12-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-462

In the Matter of

Amendment of Section 73.202(b), RM-7467
Table of Allotments,
FM Broadcast Stations.
(Banks, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 23, 1991; Released: May 6, 1991

By the Chief, Allocations Branch:

1. At the request of Robert Anthony Fogal, d/b/a Common Ground Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7675 (1990), proposing the substitution of Channel 298C3 for Channel 298A at Banks, Oregon, and the modification of his construction permit to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. Michael T. McKenna ("McKenna") filed a counterproposal requesting the allotment of Channel 297C3 at Ilwaco, Washington, as the community's first local FM service, and the petitioner filed reply comments.[1]

2. We believe the public interest would be served by allotting Channel 298C3 to Banks, Oregon, since it would provide the community with a wide coverage area FM service. The substitution can be made in compliance with the Commission's minimum distance separation requirements at the site specified in petitioner's construction permit without a site restriction.[2] Concurrence of the Canadian government has been obtained, since Banks is located within the 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit to specify operation on Channel 298C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 20, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Banks, Oregon	298C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Robert Anthony Fogal, d/b/a Common Ground Broadcasting, Banks, Oregon, IS MODIFIED to specify operation on Channel 298C3, in lieu of Channel 298A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] McKenna's proposal will not be considered as a counterproposal in this proceeding since his request and the petitioner's are not mutually exclusive. McKenna's proposal, however, will be accepted as petition for rule making (RM-7593) and will be the subject of a separate *Notice of Proposed Rule Making*. The reply comments filed by the petitioner are moot and will not be discussed.

[2] The coordinates for Channel 298C3 at Banks are North Latitude 45-39-57 and West Longitude 123-00-35.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WESTERN RADIO SERVICES COMPANY, INC. File No. 21531-CD-P/ML-88

For facilities in the Public Land Mobile Service, at Bend, Oregon for station KKB641

US WEST PAGING, INC. File No. 22406-CD-P/ML-88

For facilities in the Public Land Mobile Service at Redmond, Oregon for station KNKK610

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 1991; Released: May 6, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. The captioned applications of Western Radio Services Company, Inc. (Western) and US WEST Paging, Inc. (USWP) are partially mutually exclusive. Western currently operates a paging station on 158.70 MHz at Bend, Oregon. Western seeks to add a new 158.70 MHz transmitter within forty miles of Western's existing station, and to add a 158.10 MHz channel at the same location. USWP has applied for a new 158.10 MHz paging facility at Redmond, Oregon.

2. Western requested a comparative hearing pursuant to Section 22.33(c)(2) of the Commission's rules. USWP opposed the request and Western filed a reply. For the reasons stated below, we deny Western's request and will schedule the captioned applications requesting frequency 158.10 MHz for lottery.

II. DISCUSSION

3. Section 22.33(c)(2) allows applicants to request a comparative hearing when seeking to add a frequency in the same frequency band, and at the same location, or within forty miles, of an existing station. The request must demonstrate how the public interest would be served by using a comparative procedure instead of a lottery.[1] Paging applicants, in particular, must make a "substantial showing" to justify a hearing request under Section 22.33(c)(2).[2] Furthermore, selection by lottery is the general rule for both paging and two-way applicants, and exceptions to this rule are strictly construed and enforced. *See, e.g., Metro Mobile Corporation*, 5 FCC Rcd 1040 (Mob. Serv. Div. 1990); *Mobile Phone of Texas*, Mimeo No. 2728 (Mob. Serv. Div. released Feb. 22, 1985).

4. Western contends that the public interest would be served by using a comparative hearing in the present case. Western argues that it needs an additional channel at Bend, Oregon to alleviate congestion and provide more rapid service on its existing system.[3] Western further states that there are two other paging operators in the area, each with a multi-channel system, and that in order to remain competitive Western will need an additional channel. Western states that the 158.10 MHz frequency is the only one available in the 150 MHz band, and that some pagers would have to be replaced if Western added a channel from another frequency band.[4] Finally, Western argues that its proposal is superior to the proposal of USWP.

5. While Western is eligible to request a comparative hearing pursuant to Section 22.33(c)(2),[5] Western has not made the substantial public interest showing required. It is uncontested that there are additional channels available on other frequency bands. Thus, even if the only available 150 MHz frequency were awarded to USWP by lottery, Western could still expand by using another frequency. Under these circumstances, Western must demonstrate not simply that it needs an additional channel, but rather that it needs the 158.10 frequency as opposed to any of the other available frequencies. On this point Western merely states that if it obtains the 158.10 MHz frequency no pagers would have to be replaced. Western's request provides no information about the number and cost of the pagers involved and no discussion of exactly how the public interest would be affected if Western were to use a frequency from another frequency band instead of the 158.10 MHz frequency.[6] We conclude that Western has not made the substantial showing necessary to justify a comparative hearing.[7]

III. ORDERING PARAGRAPHS

6. Accordingly, IT IS ORDERED that the request for comparative hearing filed by Western Radio Services Company, Inc. IS DENIED.

7. IT IS FURTHER ORDERED that a lottery between the captioned applications of Western Radio Services Company, Inc. and US WEST Paging, Inc. SHALL BE HELD at a time and place to be specified in a subsequent public notice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.33(c) of the rules.

[2] *Amendment of the Commission's Rules to Allow the Selection from Among Certain Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 57 RR 2d 427, 436 n.14 (1984). Paging frequencies are not trunked. A frequency from another frequency band can therefore be added more

easily to a paging system than to a trunked two-way system. *See* 57 RR 2d at 436 n.14; *Hudson-Mohawk Telephone Company, Inc.*, Mimeo No. 4676 (Com. Car. Bur. released May 22, 1986) (given the "fungible" nature of paging frequencies, comparative hearings would not be available to paging applicants seeking to add an additional channel).

[3] Western states that many of its customers request tone-plus-voice paging, and that voice messages must be repeated, resulting in channel congestion and delays. Western states that if it obtains an additional channel it will separate its service offerings by shifting analog (voice) receivers to the new channel, thus relieving congestion.

[4] Western can modify its existing pagers to operate on a new 150 MHz frequency, but would have to buy some new pagers to operate on another frequency band.

[5] Western meets the eligibility requirements of Section 22.33(c)(2) because it seeks to add an additional 150 MHz band channel to its existing system and at the same location.

[6] Furthermore, a frequency search performed by the Commission's staff indicates that there is currently a 152.12 MHz frequency available that could be used by Western at its proposed location.

[7] *See* 57 RR 2d at 436 n.14. *See* also *Memphis Dispatch, Inc.*, 6 FCC Rcd 1220, 1221 (Mob. Serv. Div. 1991), and cases cited therein, where demand showings were found insufficient to justify a comparative hearing pursuant to Section 22.33(c)(1) of the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SARKES TARZIAN, INC. File No. BPCT-860507KG

For Modification of Facilities of
Station KTVN(TV), Reno, Nevada

MEMORANDUM OPINION AND ORDER

Adopted: April 23, 1991; Released: May 6, 1991

By the Commission:

1. The Commission has before it for consideration: (a) the above-captioned application of Sarkes Tarzian, Inc. (Tarzian), licensee of station KTVN(TV), channel 2 (CBS), Reno, Nevada, for modification of facilities; (b) informal objections to the grant of that application, filed by KTVU, Inc. (KTVU), licensee of station KTVU(TV), channel 2 (IND), Oakland, California, and by the Association of Maximum Service Telecasters, Inc. (AMST); and (c) related pleadings.

2. Tarzian currently operates station KTVN from a site at Red Mountain near Reno, Nevada, with an antenna height of 490 feet above average terrain (HAAT) and with effective radiated visual power of 34.7 kW. The station's existing site meets all Commission spacing requirements. A substantial population in several communities located within station KTVN's predicted Grade B contour are allegedly unable to receive direct off-the-air service due to the mountainous terrain. Therefore, Tarzian seeks permission to change KTVN's transmitter location to McClellan Peak, approximately 15 miles southeast of Reno, and to make changes in its transmission system, including the installation of a directional antenna intended to suppress radiation in the direction of KTVU(TV). From the proposed site, KTVN's effective radiated power would be 89.1 kW, with an HAAT of 2,153 feet. The proposed site is 13.4 kilometers (8.3 miles; 189.5 miles required) short spaced to KTVU(TV).[1] Tarzian has requested a waiver of the spacing requirements set out in Section 73.610(b) of the Commission's Rules.

3. In support of its request, Tarzian claims that several communities, including Carson City (population 32,000), within the KTVN predicted Grade B contour are unable to receive direct off-the-air service because of the mountainous terrain characterizing the KTVN service area. Tarzian maintains that operation from McClellan Peak would provide Grade B or better service to 430,145 persons in an area of 55,137 square kilometers (21,300 square miles), whereas the present facilities only provide Grade B or better service to 301,266 persons in an area of 24,368 square kilometers (9,400 square miles). It avers that 128,879 persons in a 30,769 square kilometer area (11,900 square miles) would be able to receive Grade B or better service from KTVN for the first time and that 43,584 persons would receive their first CBS off-the-air service. Because the proposed KTVN Grade B contour completely encompasses the existing Grade B authorized contour, Tarzian claims that no person now currently receiving predicted Grade B or better service would lose that service. Consideration of alternative sites, Tarzian states, was limited to those sites that would provide actual off-the-air service to Carson City without creating objectionable interference to station KTVU(TV). It contends that the McClellan Peak site was chosen because no other site, either fully spaced or involving less short spacing to KTVU(TV), would achieve line-of-site coverage to both Reno and Carson City.

4. Moreover, Tarzian points out that the staff, by letter dated July 22, 1985, denied its earlier modification application to relocate the KTVN transmitter to Slide Mountain, another site near Reno, because it was determined that operation from that site would result in a substantial increase in the probability of interference within the KTVU(TV) Grade B contour. Tarzian maintains that the proposed McClellan Peak site was selected to overcome this obstacle. It further claims that the McClellan Peak site differs from the Slide Mountain site in that: (1) the degree of short spacing to KTVU(TV) is substantially less (8.3 miles versus 14.2 miles); (2) the proposed operation from McClellan Peak is more than 2,000 feet lower than the proposed operation from Slide Mountain; and (3) the Carson Range of mountains, of which Slide Mountain is a part, is an additional obstruction in the path towards KTVU(TV). Thus, Tarzian argues that these differences, combined with its commitment to reduce power in the direction of KTVU(TV), substantially lessen the possibility of interference to that station. Additionally, Tarzian states that it is willing to install at KTVU(TV) and KTVN precise frequency offset equipment to insure against the prospect of any objectionable interference occurring to KTVU(TV).

5. In its objection, KTVU argues that the information submitted by Tarzian is insufficient to support a departure from the spacing standards of Section 73.610, and the critical policies which they reflect. It claims that KTVN's operation from McClellan peak would create a loss of principal-community service to 16.8% of Reno. Such loss of service to a station's city of license in a short-spacing situation is contrary to the public interest, KTVU states, and requires extraordinary justification, citing *St. Anthony Television Corp.*, 8 FCC 2d 294 (1967). It further argues that Tarzian's waiver request must be denied because it fails to demonstrate that there are no fully spaced sites from which KTVN can improve its coverage. In this connection, KTVU notes that Castle Peak, a site rejected by Tarzian complies with Section 73.610, and would provide Grade B service to 385,959 persons in an area of 39,992 square kilometers (15,440 square miles), including Carson City and other communities which Tarzian claims do not receive service. Moreover, KTVU maintains that whether or not line-of-sight or direct off-the-air service can be provided to a particular community is not a relevant factor in determining the suitability of a particular site. It contends that line-of-sight and direct off-the-air service are not concepts embodied in the Rules.

6. KTVU further alleges that Tarzian has failed to provide public interest reasons which would support its waiver request. It asserts that an increase in the population served is insufficient to warrant a waiver of Section 73.610 when the area is not unserved or underserved. *See Stoner Broadcasting System, Inc.*, 49 FCC 2d 1011, 1012 (1974). KTVU states that in addition to KTVN, Carson City resi-

dents receive off-the-air television service from three stations in Reno (KOLO-TV, channel 8 (ABC); KAME-TV, channel 21 (IND); and KCRL-TV, channel 4 (NBC)), and that the Carson City cable system carries KTVN(TV), KCRL-TV, KOLO-TV, KTVU(TV), KAME-TV, KCRA-TV and KGO-TV. Since KTVN is the only CBS affiliate, KTVU argues, it is unlikely that the cable system would drop a CBS affiliate which is available off the air in favor of a distant station whose carriage would require payment of microwave and copyright costs. Additionally, KTVU observes that four television translators and three cable television systems in the gain area carry KTVN, and that eight television translators and seven cable television systems carry KTVN within its present Grade B contour. Citing several cases, KTVU avers that Commission precedent clearly establishes that an applicant's desire to provide new or additional service to a community, which is not its city of license, cannot support a waiver of the minimum spacing requirements. It argues that a licensee's desire to improve its competitive position does not justify a waiver of Commission rules. KTVU further states that equivalent protection does not constitute a public interest justification for waiver, but is a condition of any waiver which is granted. Moreover, it maintains that the installation of precision offset equipment cannot resolve the deficiencies in Tarzian's proposal. Finally, KTVU claims that because Tarzian proposes a maximum power of 89.1 kilowatts (19.5 dBk) which exceeds the 88.2 kilowatts (19.455 dBk) maximum power permitted by Section 73.614(b)(2) of the Commission's Rules for the proposed antenna height of 656.2 meters above average terrain, and since a waiver has not been requested, the application should be dismissed.

7. In opposing the waiver request, AMST also argues that Tarzian has failed to show that no fully spaced sites are available, and has failed to make a public interest showing that grant of the requested waiver would outweigh the public interest in protecting the integrity of the Commission's separation requirements.

8. In reply, Tarzian maintains that KTVU ignores the fact that KTVN's primary objective in moving its site is to provide satisfactory off-the-air television service to Carson City, which has no local television station. Tarzian points out that Carson City, the capital of Nevada, is the third largest metropolitan area and the fastest growing area within the state. Therefore, it states that the absence of a satisfactory off-the-air signal from KTVN deprives that city of KTVN's local programming and CBS network programming. Tarzian asserts that its engineering showings demonstrate that satisfactory off-the-air coverage to Carson City could not be achieved from Castle Peak, or from any other site which meets the spacing requirements, because of terrain blockage. To support its claim, Tarzian provided terrain profile graphs which it contends show that off-the-air coverage to Carson City from Castle Peak would not be adequate. Tarzian states that field strength measurements show that from its present site the actual signal strength (46.5 dBu) over Carson City is significantly less than the predicted Grade B signal strength. Although similar field strength measurements could not be made from Castle Peak, Tarzian claims that actual field strength over Carson City would not be significantly improved from Castle Peak because a deeper shadowing condition exists between Castle Peak and Carson City than exists between its present site and Carson City.[2] Thus, it argues, off-the-air reception in Carson City from Castle Peak will be no better than the reception now actually received from its present site. Tarzian claims that a study undertaken by the A.C. Nielsen Company for the purpose of comparing the viewership in Carson City and Reno of KTVN and KOLO-TV, both licensed to Reno, further confirms the absence of a satisfactory KTVN signal in Carson City.[3]

9. With respect to the alleged violation of Section 73.614 of the Rules, Tarzian submitted an engineering statement which it believes demonstrates full compliance with the Rules. Concerning principal-community coverage, Tarzian maintains that it will continue to provide the required 74 dBu coverage from the proposed site over all of Reno. Tarzian further states that KTVU has not demonstrated a violation of that rule.

DISCUSSION

10. The Television Table of Assignments was established so that stations in a given community could operate with maximum power and antenna height without creating objectionable interference to neighboring stations. To maintain the integrity of the Table, it was necessary to establish minimum mileage separations and to allow only limited deviations from those separations. Those spacing requirements presumptively serve the public interest, and applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver in the circumstances presented than by following the terms of the rule. When a licensee operating from a fully spaced site seeks authority to move to one that is short spaced, we have reviewed several factors: (1) the unsuitability of the existing site, either in terms of the economic viability of the station, in technical terms, or in a licensee's inability to reach areas containing a significant number of viewers who lack service, a network service, or "independent" service; *see Roy H. Park Broadcasting, Inc.*, 45 RR2d 1083 (B/c. Bur. 1972); *WSET, Incorporated (WSET-TV)*, 80 FCC2d 233 (1980); (2) the magnitude of the short-spacing; *compare Clay Broadcasting Corp.*, 50 RR2d 1273, *recon. denied*, 51 RR2d 916 (1982) (approval of 5-mile shortfall out of 190 required) *with West Michigan Telecasters, Inc.*, 22 FCC2d 943, *recon. denied*, 26 FCC2d 668 (1970), *aff'd*, 460 F.2d 883 (D.C. Cir. 1972) (denial of 15-mile shortfall out of 170 required); (3) the nature and extent of any predicted loss of service that would result from a grant of the short-spacing;[4] *see Roy H. Park Broadcasting, Inc., supra;* and *Blair Broadcasting of California, Inc.*, 55 RR2d 619 (MMB 1984); (4) the aeronautical and environmental benefits and drawbacks of locating a tower in a particular area; *see Roy H. Park Broadcasting, Inc., supra;* (5) the concerns, if any, expressed by the licensee(s) to which short-spacing would result; *see WSET, Incorporated, supra;* and *Blair Broadcasting of California, Inc., supra;* and (6) the extent to which the licensee obtained its license knowing there were spacing restraints imposed in a rulemaking proceeding; *see Townsend Broadcasting Corporation, supra;* and *WLCY-TV, Inc.*, 16 FCC2d 506 (Rev. Bd. 1969), *review denied*, 25 FCC2d 832 (1970). Additionally, in *Caloosa Television Corporation*, 3 FCC Rcd 3656, *recon. denied*, 4 FCC Rcd 4762 (1989), the Commission stated that when acting on requests for waivers of the spacing requirements, it shall continue to consider the above fac-

tors, as may be appropriate, but shall also consider whatever technical proposal an applicant might make to reduce or eliminate objectionable interference.

11. The inability to provide a significant number of viewers with additional service, including network service to the state capital, from the licensee's current site is apparent and not disputed by KTVU. Several communities within its existing predicted Grade B contour cannot receive adequate off-the-air service from the station. Field strength measurements demonstrate that actual signal strength over these communities is significantly less than the predicted Grade B signal strength. One of those communities, Carson City, the state capital, with a population of more than 32,000, is located a mere 25 miles away. Significantly, this coverage problem cannot be resolved by merely increasing height and power at the existing site. It appears that no real benefit would be achieved by a power increase at the present site since the topography is such that any additional signal strength would be almost entirely attenuated. An increase in height at the existing site is foreclosed because of aeronautical safety considerations. From the proposed site, obstruction-free paths should afford good reception to Carson City, and provide Grade B or better service for the first time to nearly 120,000 persons. More importantly, the proposed operation can be expected to provide off-the-air CBS network programming for the first time to 43,584 persons. KTVU contends that the Castle Peak site meets the Commission's spacing requirements and would provide adequate off-the-air service to Reno and Carson City. While it is true that Castle Peak would meet the spacing requirements, Tarzian has shown that the improvements in service from its proposed site, cannot be obtained from operating at Castle Peak. Moreover, our review of the engineering data submitted by Tarzian confirms that operation from Castle Peak would not provide line-of-sight service to Carson City. As noted, the primary objective of Tarzian's application is to provide actual off-the-air service to Carson City, not predicted service. Based upon the information before us it does not appear that the Castle Peak site is an adequate alternative site. *See WSET Incorporated (WSET-TV)*, 80 FCC 2d at 242.

12. While the degree of short spacing in this case is not *de minimis* (8.3 miles), it is well within the range of short spacing that has been approved in the past upon an appropriate public interest showing. *See, e.g., Van Curler Broadcasting Corp.*, 24 RR 1079 (1963). Operation from the proposed site, will not result in any loss of service, but, as noted above, will result in significant service gains, a fact not disputed by KTVU. The proposed site meets aeronautical requirements, and no environmental concerns have been expressed.

13. Although KTVU does not agree, we find that the showing provided by Tarzian complies with protection standards found acceptable in the past. *See WSET, Incorporated, supra.* In addition to the equivalent protection provided by the use of a directional antenna, the intervening terrain barriers of the Sierra Nevada Range and the Carson Range further reduce the probability of objectionable interference to KTVU(TV). Thus, the potential for objectionable interference to KTVU(TV) will be no greater than it would be from a fully space site using maximum facilities. Moreover, Tarzian has stated that it is willing to install offset equipment at KTVU(TV) and KTVN to further assure against interference occurring to station KTVU(TV).

14. KTVU cites three cases which it claims establish that an applicant's desire to provide new or additional service to a community which is not its city of license cannot support a waiver of the minimum spacing requirements. We agree that an applicant's desire to serve other communities outside of its city of license, standing alone, would not support a waiver of the minimum spacing requirements. However, when acting upon requests for short-spacing waivers, the Commission considers several factors, as noted above, and each request stands on its particular facts. In each of the cases cited by KTVU, the Commission's decision to deny the request was based on the particular facts of the request and the failure of the applicant to advance a sufficient basis to support a departure from our spacing requirements, and not on the fact that increased service to a community other than the community of license was involved.[5] Here, however, Tarzian has made a persuasive showing of the public interest benefits flowing from the requested waiver, including additional television service to underserved areas.

15. KTVU's argument that Tarzian's application should be dismissed because it does not comply with Section 73.614 of the Rules, fails because KTVN's application, as submitted, complies with that rule. Station KTVN's proposed power is rounded in accordance with Section 73.615 of the Rules to 89.1 kilowatts (19.5 dBk). When KTVN's proposed antenna height is used in the calculation of Section 73.614 of the Rules, the result is a maximum power of 19.46 dBk, which also rounds, in accordance with Section 73.615 of the Rules, to 19.5 dBk.

16. Lastly, we disagree with KTVU's contention that some areas of Reno will receive less than the required principal-community coverage. Technical data submitted by Tarzian indicates that operation of KTVN from McClellan Peak will provide a predicted 74 dBu median field strength contour that encompasses all of Reno in compliance with Section 73.685 of the Rules. Further, while KTVU has identified some areas where it alleges that shadowing will result in less than a 74 dBu signal, we can find no basis for concluding that any locations in Reno will be so severely shadowed that they would not receive acceptable service. It is inherent in the statistical nature of predicting television signal propagation that some locations will have greater, and some lesser, field strengths than the designated median.[6] It is those locations predicted to receive less than 74 dBu that KTVU points out as not receiving principal-community service. However, no information was submitted with respect to how much less than 74 dBu the signal strengths in the shadow areas were predicted to be and no attempt was made to relate those reduced signal levels to acceptable service. Thus, it appears that Tarzian's proposal also complies with the underlying service concept of the principal-community coverage requirement. *See Sixth Report and Order on Television Allocations*, 41 FCC 148, 176-77 (1952), and *Boulder Telecasting Corporation (KTVJ(TV))* (MMB, January 17, 1985).

17. For the stated reasons, we find that grant of KTVN's application and waiver request is in the public interest. Accordingly, IT IS ORDERED, That the informal objections filed by KTVU, Inc. and the Association of Maximum Service Telecasters, Inc. ARE DENIED, Sarkes Tarzian, Inc.'s request for waiver of Section 73.610(b) of the Rules IS GRANTED, and its application IS GRANTED subject to the following condition:

The maximum visual effective radiated power at azimuths between 212 and 260 degrees True towards station KTVU(TV), Oakland, California, shall not exceed 17.0 dBk (50.1 kW). The application for license shall include:

a. Horizontal plane radiation pattern obtained from measurements performed by the manufacturer for the transmitting antenna prior to its installation.

b. Vertical radiation patterns obtained from measurements by the manufacturer for the transmitting antenna prior to its installation for at least the azimuth towards station KTVU(TV) (236 degrees True).

c. An affidavit by a qualified and licensed surveyor that the proper azimuth orientation of the transmitting antenna has been achieved to meet the radiation limitations prescribed above to protect station KTVU(TV).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] When filed, Tarzian's application was also short spaced to the unoccupied channel 2, Goldfield, Nevada, allocation. However, effective February, 1989, the Commission substituted channel 7 for channel 2. Thus, Tarzian's proposal is no longer short spaced to the Goldfield, Nevada, allocation.

[2] Tarzian states that field strength measurements could not be made from Castle Peak because Castle Peak is an undeveloped location with no power available and no existing signal source which could be used for measurement purposes.

[3] KOLO-TV's transmitter site is located on Slide Mountain, and provides a direct line-of-sight transmission path to Carson City. The Nielsen report showed that the noncable viewership of the two stations in Carson City was 46.3% for KOLO-TV and 18.5% for KTVN, while in Reno, where both stations provide line-of-sight service, viewership was 26.7% for KOLO-TV and 24.8% for KTVN.

[4] In this regard, we will evaluate the extent to which a proposal creates or eliminates unserved or underserved areas. *See Hall v. FCC*, 237 F.2d 567, 572 (D.C. Cir. 1961); and *KTVO, Inc.*, 57 RR2d 648 (1984).

[5] In *Greater Media, Inc.*, 59 FCC2d 796 (1976), a licensee requested a waiver of the minimum spacing requirements in order to improve coverage to its city of license. The Commission denied the request because the licensee did not demonstrate that its existing service was inadequate. The Commission noted that the station's 70 dBu contour completely encompassed the city of license. Thus, in the absence of actual measurements demonstrating the contrary, the Commission concluded that service was not "patently inadequate" and found no justification for waiver of the minimum spacing requirements. In *Stoner Broadcasting System, Inc.*, 49 FCC2d 1001 (1974), the Commission denied a shortspaced proposal because the alleged provision of new service to a substantial number of persons was in an area already served by numerous (more than nine) broadcast outlets of the same service, and the applicant failed to adequately support its claim that aeronautical considerations made its selected site the only one available. Finally, in *Clay Television, Inc.*, 95 FCC2d 1167 (Rev. Bd. 1983), wherein the Review Board affirmed an initial decision denying a mutually exclusive application for a new UHF station due to the applicant's failure to justify its short-spaced proposal. Although the applicant alleged that it provided "superior coverage" from its short-spaced site, the proposal was denied because the applicant failed to sustain its burden of proceeding on the specified issue of whether or not the potential interference was significant. The applicant relied instead on a showing that "equivalent protection" would be provided, a doctrine not available to the UHF service. Thus, in each of the cases cited by KTVU, the short-spaced waiver proposals were denied on other grounds (articulated above) and not because of the applicants' desire to provide new or additional service to communities beyond their city of licenses.

[6] The Rules do not specifically state that the *median* field strength to the principal-community must be 74 dBu; however, Section 73.684(c) indicates that field strength predictions are to be made utilizing F (50, 50) charts. Those charts estimate the field strength expected at 50 percent of the locations 50 percent of the time or, in other words, a median field strength.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-349

In re Applications of

AGANA GUAM FM RADIO LIMITED PARTNERSHIP — File No. BPH-880914MX

For Construction Permit for a New FM Station on Channel 270C2 in Agana, Guam

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: April 15, 1991; Released: May 7, 1991

1. Under consideration are Motion for Summary Decision and Request for Suspension of Procedural Dates, filed March 26, 1991 by Agana Guam FM Radio Partners; Request for Prehearing Conference, filed April 1, 1991 by Agana Guam FM Radio Limited Partnership; and Petition for Leave to Amend and Amendment, filed March 26, 1991 by Agana Guam FM Radio Limited Partnership.[1]

2. Radio requests summary decision on the site availability issue, the only issue in this proceeding. Radio has submitted corroborated detailed evidence about how it obtained reasonable assurance for its designated site. The Mass Media Bureau, after reviewing in detail Radio's showing, urges that Radio has demonstrated that the motion for summary decision should be granted. Radio has also petitioned to amend to designate a new site and the Bureau urges that the amendment be accepted. After reviewing all the evidence, it is apparent that the motion for summary decision should be granted. The amendment designating a new antenna site will be accepted and, because there are no remaining issues, Radio's application will be granted.

3. ACCORDINGLY, IT IS ORDERED that the petition for leave to amend and amendment, filed March 26, 1991 by Agana Guam FM Radio Limited Partnership IS GRANTED and the amendment IS ACCEPTED.

4. IT IS FURTHER ORDERED that the motion for summary decision and request for suspension of procedural dates, filed March 26, 1991 IS GRANTED and the application of Agana Guam FM Limited Partnership (File No. BPH-880914MX) on Channel 270C2 in Agana, Guam IS GRANTED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTES

[1] *James W. Shook* appeared on behalf of the Mass Media Bureau and *James L. Winston* and Desmond P. Brown appeared on behalf of Agana Guam FM Radio.

[2] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 1, 1991

Report No. I-6569

AUTOMATIC TRANSMITTER IDENTIFICATION SYSTEM

In the First Report and Order of Docket 86-337, *An Automatic Transmitter Identification System for Radio Transmitting Equipment*, the Commission indicated that all satellite uplink transmissions carrying broadband video information shall be identified through the use of an automatic transmitter identification system. This equipment is to be installed and operational on May 1, 1991.

We have received inquiries concerning whether this proceeding applied to international earth stations. In the Further Notice of Proposed Rule Making released July 9, 1987, the Commission stated that "the international issue will be appropriately raised, but is, of course, beyond the scope of this proceeding." Therefore, the rules created by this Docket, Sections 25.206 and 25.308, do not apply to earth stations operating via international or foreign satellites. Earth stations which have transborder authority and are operating via U.S. domestic satellites must comply with the rules.

For further information on the matter contact John Hudak (202) 632-6977 or Michael Pollak (202) 632-7834.

By the Chiefs, Field Operations and Common Carrier Bureaus

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-131

In the Matter of

Amendment of Section 73.202(b), RM-7702
Table of Allotments,
FM Broadcast Stations.
(Kings, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 24, 1991; Released: May 7, 1991

By the Chief, Allocations Branch:

1. Donald Brady ("petitioner") has requested the allotment of FM Channel 246A to Kings, Mississippi, as that community's first local broadcast service. Petitioner provided an engineering study in support of the request and indicated his intention to file an application for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment would provide a first local broadcast service to Kings, Mississippi.[1] Channel 246A can be allotted to Kings, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[2]

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kings, Mississippi	---	246A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 28, 1991,** and reply comments on or before **July 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald Brady
5880 Ridgewood Road, Apt. D-40
Jackson, Mississippi 39211
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that although Kings, Mississippi, is unincorporated, it is listed in the 1980 U.S. Census as a Census Designated Place with a populatin of 1,165. Kings shares a zip code with the larger community of Vicksburg, Mississippi.

[2] The coordinates for Channel 246A at Kings are 32-24-01 and 90-51-07.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-132

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-7692
FM Broadcast Stations.
(Neenah-Menasha, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 25, 1991; Released: May 7, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Fox Valley Broadcasting, Inc. ("petitioner"), requesting the substitution of FM Channel 232C3 for Channel 232A at Neenah-Menasha, Wisconsin. Petitioner also requests modification of its license for Station WROE, Channel 232A, to specify operation on Channel 232C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal would provide Neenah-Menasha with a wide coverage area FM station. Channel 232C3 can be allotted to Neenah-Menasha, Wisconsin, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 16.5 kilometers (10.2 miles) northwest of the community.[1] We shall also propose to modify petitioner's license for Station WROE to specify operation on Channel 232C3 in lieu of Channel 232A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Neenah-Menasha or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the above, the Commission believes it appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Neenah-Menasha, Wisconsin	232A, 262A	232C3, 262A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 28, 1991,** and reply comments on or before **July 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas J. Hutton
Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W.
Washington, D.C. 20237
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 232C3 are 44-19-00 and 88-33-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-96

In re Applications of

PRUITT, INC. (hereafter "Pruitt")	File No. BPH-891011MK
JOHNSON RADIO COMPANY, INC. (hereafter "Johnson")	File No. BPH-891012MH
DAVID H. GREENLEE (hereafter "Greenlee")	File No. BPH-891012MJ
MICHAEL T. HARDING (hereafter "Harding")	File No. BPH-891012MM
PATRICIA RODGERS (hereafter "Rodgers")	File No. BPH-891012NC
THE EAGLE SHELBY GROUP (hereafter "Eagle")	File No. BPH-891012NG

For Construction Permit for a New FM Station on Channel 260A in Campbellsville, Kentucky

HEARING DESIGNATION ORDER

Adopted: March 28, 1991; Released: May 8, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter*. On June 26, 1990, Rodgers filed a Petition to Deny ("petition") the application of Johnson. Rodgers' petition is essentially a petition to specify issues. Since the Commission's Report and Order in the matter of *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part I of the Commission's Rules*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to 47 C.F.R. Section 1.229.

3. Eagle petitioned for leave to amend its application on April 16, 1990. The accompanying amendment was filed after February 2, 1990, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

4. Section II, Item 6 (new form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Pruitt has not completed Item 6 correctly. Pruitt's application gives a post office box number as the residence address for Lenn and Mary Ellen Pruitt. Accordingly, Pruitt must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

5. Section III, Item 3 (new form) of FCC Form 301 (June 1989) requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. Harding has not provided an address or contact person as requested in Item 3. Accordingly, Harding must submit an amendment which gives all the information required by Section III, Item 3 to the presiding Administrative Law Judge after this Order is released.

6. Applicant Michael T. Harding is also the General Manager of television station WGRB, Campbellsville, Kentucky. This employment in a managerial capacity may represent a potential violation of the Commission's cross-interest policy. *See Reexamination of the Commission's Cross - Interest Policy*, 4 FCC Rcd 2208 (1988). Accordingly, a cross-interest issue will be specified.

7. Harding's application requests processing pursuant to 47 C.F.R. Section 73.213(c)(1).[1] An engineering study of the proposed facility reveals a discrepancy in HAAT value specified by the applicant and that determined by the staff using the Commission's database and the geographic coordinates, and the antenna radiation center above mean sea level (RCAMSL) supplied (361 m) in the application. Specifically, in Section V-B, Item 7(b)(3) of the application, the HAAT is listed as 100 meters (m) whereas the staff finds the HAAT to be 123 m.[2] The effective radiated power in the application of 3 kilowatts and a HAAT of 123 m would exceed the maximum facilities for a Class A station specified in Section 73.213(c)(1). Accordingly, Harding shall submit an amendment demonstrating that, in fact, the applicant's HAAT calculation is accurate, thus establishing that the proposed facilities are within the limit for a Class A facility, as specified in Section 73.213(c)(1), to the presiding Administrative Law Judge after this Order is released.

8. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Harding has filed such statement, it is deficient. Harding has not listed appropriate recruitment sources for African Americans. Accordingly, Harding will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

9. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the following applicant has been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Harding would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Harding's application, whether the involvement of Michael T. Harding with WGRB(TV) is consistent with the Commission's cross-interest policy, and if not, whether a grant of the application would be in the public interest.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Harding would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Eagle IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That Pruitt shall submit an amendment which contains the information required by Section II, Item 6 (new form) of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That Harding shall submit an amendment which contains the information required by Section III, Item 3 (new form) of FCC Form 301 to the presiding Administrative Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Harding shall submit an amendment establishing the validity of the HAAT specified. If the amendment does not establish that the HAAT submitted is accurate or the correct HAAT value is greater than 100 meters by using the RCAMSL of 361 as specified in the application, then the Administrative Law Judge shall dismiss the application for violation of 47 C.F.R. Section 73.213.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Harding shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] 47 C.F.R. Section 73.213 states, in pertinant part, that "[n]ew stations on channel allotments made by order granting petitions to amend the Table of FM Allotments which were filed prior to October 2, 1989, may be authorized in accordance with paragraph (c)(1) or (c)(2) of this section." Moreover, Section 73.213(c)(1) states "[e]ach application for authority to operate a Class A station with no more than 3000 watts ERP and 100

meters antenna HAAT (or equivalent lower ERP and higher antenna HAAT based on a class contour distance of 24 km) must specify a transmitter site that meets the minimum distance separation requirements of this paragraph."

[2] There is no inconsistancy within the application as to the HAAT -- it is consistently given throughout the application as being 100 meters.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-111

In the Matter of

Miscellaneous Amendments to
Part 80 of the Rules Governing
the Maritime Radio Services

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1991; Released: May 8, 1991

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making (Notice) proposes to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to clarify the maritime frequency tolerance rules, to change the certification requirements for field strength measurements on radiotelegraph ship installations, and to update and correct various Part 80 rule sections. These actions are taken, partially, in response to requests from Mackay Communications (Mackay) and Exxon Communications Company (Exxon).[1]

II. PROPOSAL

2. *Frequency tolerance*. Section 80.209 of the Rules, 47 C.F.R. § 80.209, contains the frequency tolerance requirements for all transmitters that operate in the maritime frequency bands. Because of the various changes to the frequency tolerance rules made over the years[2] and that fact that we "grandfathered" equipment when many of these changes were implemented, there are multiple cut-off dates currently specified in the Rules, some of which are obsolete. Additionally, as Mackay points out, the frequency tolerance table is incomplete, *i.e.*, there are blanks or gaps in the table that lead to confusion regarding the frequency tolerances applicable to certain equipment type-approved before November 30, 1977, and in use after January 1, 1990. [3]

3. We propose, therefore, to correct, clarify, and simplify the frequency tolerance table contained in Section 80.209(a) of the Rules. Specifically, we propose to eliminate one entire column in the table that ceased being applicable after January 1, 1990, and to eliminate other references to dates since passed that have no continuing relevancy. Further, where a gap exists in the table we propose to insert the appropriate frequency tolerance consistent with Appendix 7 of the international Radio Regulations (Geneva, 1979) and the Rules applicable to transmitters type-accepted or approved after November 29, 1977. In addition, we propose to "grandfather" existing ship station manual Morse Code telegraphy transmitters type approved before November 30, 1977, operating in the 100-525 kHz band which meet the pre-January 1, 1990, frequency tolerance requirements.[4] This type of equipment is required to be carried on board large ocean going vessels as part of today's international ship-to-ship distress and safety system.[5] This system and the subject equipment will be phased out internationally during the 1992-1999 time frame while the new Global Maritime Distress and Safety System (GMDSS) is phased in.[6] The continued carriage of these telegraph transmitters by the less than 400 subject vessels will not cause interference or affect the safety of these vessels. Moreover, there are no transmitters of this type available for installation on U.S. vessels that meet the new Radio Regulations frequency tolerance requirements. Specific changes are shown in the Appendix.

4. *Field strength measurements*. A vessel required to carry a manual Morse code radiotelegraph installation must have its equipment inspected at least once every 12 months. *See* Section 80.801 of the Rules, 47 C.F.R. § 80.801. Further, as part of the inspection the licensee must certify that the minimum communications range of the ship's radiotelegraph station on 500 kHz (an international distress and safety frequency) is 200 nautical miles for the main installation and 100 nautical miles for the reserve installation. *See* Section 80.802(a)(2) of the Rules, 47 C.F.R. § 80.802 (a)(2). The certification may be acomplished either by producing a record of communications between ships that are the required distance apart or by arranging for a professional engineer, not affiliated with the licensee or its service company, to conduct field strength measurements.

5. Exxon asks that the Rules be amended to permit the use of a licensee's employee to conduct the field strength measurements instead of the requirement they be conducted by an independent professional engineer. Exxon states that it has a shore side group of licensed radio operators available to conduct such measurements. Exxon further states that because it operates several vessels under exemptions from the radiotelegraph equipment requirements, but continues to maintain the vessel's radiotelegraph certification, it must hire professional engineers to conduct field strength measurements for these ships. Exxon indicates it has tried to conduct ship-to-ship communications on 500 kHz while in port with no success because of high RF noise levels.

6. Exxon's suggestion to permit the field strength measurements to be conducted by qualified employees appears reasonable. We note that the ship's radio officer, an employee of the licensee, generally conducts the ship-to-ship communications used to satisfy the certification requirements of Section 80.802(a)(2). Further, we have accepted similar certifications conducted by the licensee's employees. For example, we permit the calibration of the ship's radio direction finder to be conducted by a competent technician without any other restriction. *See* Section 80.822(a) of the Rules, 47 C.F.R. § 80.822(a). We propose, therefore, to amend the Rules to permit any person, holding either a general radiotelephone license or at least a second class radiotelegraph license to conduct the field strength measurements. Licensees will still be able to conduct ship-to-ship communications to comply with this requirement.

7. *Editorial changes*. Recent changes in the Safety Convention, changes to the FCC's fee collection program and other changes to the Commission's Rules have resulted in minor inconsistencies creeping into Part 80. For example, in a number of Rule Sections the Global Marine Distress

and Safety System is referred to as the "Future" Global Marine Distress and Safety System. *See* Section 80.5 of the Commission's Rules, 47 C.F.R. § 80.5. We propose to use this proceeding to make a number of nonsubstantive changes to clarify and correct minor discrepancies in the Rules.

8. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5 U.S.C. § 605, the Commission certifies that these rule changes would not, if promulgated, have a significant economic impact on a substantial number of small entities. These amendments permit licensees the option to use their employees to conduct certain field strength measurements and correct and clarify the frequency tolerance rules applicable to the maritime radio services. Additionally, we propose to make a number of minor nonsubstantive changes.

III. PAPERWORK REDUCTION ACT

9. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501 - 3520, and found to contain no new or modified form, information collection or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease the burden hours imposed on the public.

IV. PROCEDURAL MATTERS

10. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

11. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1206.

12. Authority for issuance of this Notice is contained in Sections 4(i), 303(g) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§ 1.415 and 1.419) interested parties may file comments on or before **July 23, 1991** and reply comments on or before **August 7, 1991.** Extensions of time are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

13. IT IS ORDERED that a copy of this Notice shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377.

2. Section 80.5 is amended by removing "Future" from the entry for *Future global maritime distress and safety system (FGMDSS)* to read *Global maritime distress and safety system (GMDSS).*

3. Section 80.23 is amended by adding a sentence at the end of the first paragraph, removing paragraph (c) and redesignating paragraphs (d) and (e) as (c) and (d) to read as follows:

§ 80.23 Filing of applications.

*** Applications requiring fees as set forth at Part 1, Subpart G of this Chapter must be filed with the Federal Communications Commission in accordance with § 1.1102 of the Rules.

* * * * *

4. Section 80.207(d) is amended by revising footnote 2 in the table to read as follows:

§ 80.207 Classes of emission.

* * * * *

(d) * * *

[2] Frequencies used in the automated multi-station system. *See* § 80.385(c).

* * * * *

5. Section 80.375(a) is amended by replacing the frequencies 121.500 kHz and 243.000 kHz with 121.500 MHz and 243.000 MHz respectively.

6. Section 80.377 is amended by revising the last sentence to read as follows:

§ 80.377 Frequencies for ship earth stations.

* * * The frequency band 1645.5-1646.5 MHz is reserved for use in the Global Maritime Distress and Safety System (GMDSS).

7. Section 80.209 is amended by revising paragraph (a) and the table following paragraph (a) to read as follows:

§ 80.209 Transmitter frequency tolerances.

(a) The frequency tolerance requirements applicable to transmitters in the maritime services are shown in the following table. Tolerances are given as parts in 10^6 unless shown in Hz.

Frequency bands and categories of stations	Tolerances[1]
(1) Band 100-525 kHz	
(i) Coast stations:	
-For single sideband emissions.	20 Hz
-For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]
-For transmitters with digital selective calling emissions.	10 Hz
-For all other emissions.	100
(ii) Ship stations:	
-For transmitters with single sideband emissions type accepted or type approved before November 30, 1977.	20 Hz
-For transmitters with other emissions type accepted or type approved before November 30, 1977.	1000[5]
-For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]
-For transmitters with digital selective calling emissions.	10 Hz[3]
-For all other transmitters type accepted or type approved after November 29, 1977.	20 Hz
(iii) Ship stations for emergency only:	
-For transmitters type approved before November 30, 1977.	3000[5]
-For all transmitters type accepted or type approved after November 29, 1977.	20 Hz
(iv) Survival craft stations:	
-For transmitters type approved before November 30, 1977.	5000[5]
-For transmitters type approved or type accepted after November 29, 1977.	20 Hz
(v) Radiodetermination stations:	
-For all emissions.	100
(2) Band 1600-4000 kHz	
(i) Coast stations and Alaska fixed stations:	
-For single sideband and facsimile emissions.	20 Hz
-For narrow-band direct-printing and data emissions.	10 Hz[2]
-For digital selective calling emissions.	10 Hz
-For all other emissions.	50
(ii) Ship stations:	
-For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]
-For transmitters with digital selective calling emissions.	10 Hz[3]
-For all other transmitters	20 Hz
(iii) Survival craft stations:	20 Hz
(iv) Radiodetermination stations:	
-With power 200W or less.	20
-With power above 200W.	10
(3) Band 4000-27500 kHz	
(i) Coast stations and Alaska fixed stations:	
-For single sideband and facsimile emissions.	20 Hz

-For narrow-band direct printing and data emissions.	10 Hz[2]
-For digital selective calling emissions.	10 Hz
-For Morse telegraphy emissions.	10
-For all other emissions.	15
(ii) Ship stations:	
-For transmitters with narrow-band direct printing and data emissions.	10 Hz[2]
-For transmitters with digital selective calling emissions.	10 Hz[3]
-For all other transmitters	20 Hz
(iii) Survival craft stations:	50 Hz
(4) Band 72-76 MHz	
Fixed stations:	
-Operating in the 72.0-73.0 and 75.4-76.0 MHz bands.	5
-Operating in the 73.0-74.6 MHz band.	50
(5) Band 156-162 MHz	
(i) Coast stations:	
-For stations licensed to operate with a carrier power:	
-Below 3 watts.	10
-3 to 100 watts.	5
-Above 100 watts.	2.5
(ii) Ship stations:	10[4]
(iii) Survival craft stations operating on 121.500 MHz:	50
(iv) EPIRBs:	
-Operating on 121.500 and 243.000 MHz.	50
-Operating on 156.750 and 156.800 MHz.	10
(6) Band 216-220 MHz	
(i) Coast Stations:	
-For all emissions.	5
(ii) Ship stations:	
-For all emissions.	5
(7) Band 400-466 MHz	
(i) EPIRBs operating on 406.025 MHz.	5
(ii) On-board stations.	5
(iii) Radiolocation and telecommand stations.	5
(8) Band 1626.5-1646.5 MHz	
(i) Ship earth stations:	5

FOOTNOTES TO APPENDIX

[1] Transmitters authorized prior to January 2, 1990, with frequency tolerances equal to or better than those required after this date will continue to be authorized in the maritime services provided they retain type acceptance and comply with the applicable standards in this part.

[2] The frequency tolerance for narrow-band direct printing and data transmitters installed before January 2, 1992, is 15 Hz for coast stations and 20 Hz for ship stations. The frequency tolerance for narrow-band direct printing and data transmitters type accepted or installed after January 1, 1992, is 10 Hz.

[3] Until February 2, 1999, the frequency tolerance for DSC ship station transmitters in the MF and HF bands that were installed before January 2, 1992, is 20 Hz. The frequency tolerance for DSC ship station transmitters in the MF and HF bands type accepted or installed after January 1, 1992, is 10 Hz. After February 1, 1999, the frequency tolerance for all DSC ship station transmitters in the MF and HF bands (regardless of installation date) is 10 Hz.

[4] For transmitters in the radiolocation and associated telecommand service operating on 154.585 MHz, 159.480 MHz, 160.725 MHz and 160.785 MHz the frequency tolerance is 15 parts in 10^6.

[5] This frequency tolerance applies to ship station transmitters until February 1, 1999. Thereafter, the frequency tolerance is 20 Hz.

* * * * *

8. Section 80.802 is amended by revising paragraph (a)(2) to read as follows:

§ 80.802 Inspection of station.

(a) * * *

(2) At inspection, the minimum field strength capability of the main installation and reserve installation when connected to the main antenna may be shown by the licensee by one of the following methods: (i) Producing a record of communications on 500 kHz over a minimum distance of 370 kilometers (200 nautical miles) for the main installation and 185 kilometers (100 nautical miles) for the reserve installation which demonstrates the transmission and reception of clearly perceptible signals from ship to ship by day and under normal conditions and circumstances, or (ii) Provide documentation by a professional engineer, or a person holding a first or second class radiotelegraph certificate, or a general radiotelephone operator license, that the installation produces at 1.85 kilometers (one nautical mile) a minimum field strength of thirty (30) millivolts per meter for the main installation and ten (10) millivolts per meter for the reserve installation. The licensee shall provide, at a minimum, the name and license number of the individual making the measurements or record of communications.

* * * * *

FOOTNOTES

[1] *See* letter from Mr. Lionel Martens, Technical Manager, Mackay communications, to Mr. Robert E. Mickley, Chief, Aviation and Marine Branch, Federal Communications Commission, dated August 31, 1989, and a letter from Mr. Robert E. Mickley to Mr. Lionel Martens, dated October 18, 1989 concern-

ing frequency tolerance. *See* also letter from Mr. Donald Derryberry, Exxon Communications Company, to Mr. George R. Dillon, Federal Communications Commission, dated April 19, 1990, concerning Section 80.802(a).

[2] *See*, for example Report and Order in PR Docket No. 85-145, 51 Fed. Reg. 31206 (1986), that among other things implemented changes to the frequency tolerances for radio transmitting apparatus as a result of the Final Acts of the 1979 World Administrative Radio Conference (1979 WARC).

[3] Equipment type accepted or approved after November 29, 1977, must meet the frequency tolerance specified in Section 80.209(a).

[4] International Radio Regulation No. 342 (Geneva, 1979) permits Administrations to vary from the provisions of the Radio Regulations provided no harmful interference is caused to stations operating in accordance with the Radio Regulations.

[5] There are three types of transmitters affected: transmitters used for the main ship station, transmitters used for the emergency ship station and survival craft transmitters.

[6] The GMDSS will replace the present maritime distress and safety system, which relies on ship-to-ship distress alerting using manual Morse code, with a fully automated ship-to-ship distress alerting system using satellite and digital technologies. It will provide a new standard of safety of seafarers worldwide. It will be phased in internationally from 1992-1999. Provisions for implementing the GMDSS into the Commission's Rules were proposed in the Notice of Proposed Rule Making, PR Docket. No. 90-480, 5 FCC Rcd 6212 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FREDERICK & WARINNER

Request for Declaratory Ruling
Concerning the Proper Treatment
of Reserves and Deferred Credits
Under Part 69 of the Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1991; Released: May 8, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On June 12, 1989, Frederick & Warinner, an accounting firm providing services to telephone companies, filed a Request for Declaratory Ruling on behalf of its clients seeking to clarify the application of the Commission's Part 69 access charge rules regarding the proper allocation procedures for depreciation reserves and deferred credits. Frederick & Warinner states that uncertainty exists as to whether depreciation reserves and deferred credits should be treated under Section 69.302[1] or, alternatively, under Section 69.309[2] of the Commission's rules. We grant Frederick & Warinner's request, and rule that depreciation reserves and deferred credits properly should be treated under Section 69.302 and apportioned on the basis of the related primary plant accounts or categories.

2. Part 69 of the Commission's rules sets forth the procedures local exchange carriers (LECs) must use in computing access charges for interstate or foreign access services. The Part 69 rules prescribe specific allocation factors for LECs to use to assign their interstate regulated costs into interexchange costs and access costs and to apportion the latter among various access elements. Section 69.302(a) provides that telephone plant in service is to be apportioned in accordance with Sections 69.303-69.309. [3] Those sections, with the exception of Section 69.309, identify specific categories of investment and contain rules for the apportionment of those categories. Section 69.309 is a "catch-all" category designed to provide for "other investment," *i.e.*, any investment that does not fall within the specific categories provided for in Sections 69.303-69.308. Under Section 69.309, this residual investment is to be apportioned on the basis of combined investment. The Part 69 rules do not contain a specific reference to depreciation reserves or deferred credits.

II. FREDERICK & WARINNER'S REQUEST

3. Frederick & Warinner maintains that controversy and uncertainty surround the allocation of depreciation reserves and deferred credits under the Commission's Part 69 access charge rules. The accounting firm seeks a declaratory ruling to ensure that its clients adhere to the access charge rules and apply those rules in a manner which is consistent with the Commission's intent. According to Frederick & Warinner, two conflicting interpretations of the access charge rules have developed in the telephone industry pertaining to the proper allocation of reserves and deferred credits. One interpretation applies Section 69.302 to determine the allocation, while the other applies Section 69.309. Frederick & Warinner notes that application of these conflicting interpretations produces disparate results. Under Section 69.302, reserves and deferred credits are segregated by primary plant account or categories and apportioned on the basis of the related primary plant accounts or categories. Under Section 69.309, reserves and deferred credits are apportioned in total based on the combined investment that is apportioned pursuant to Sections 69.303 through 69.308. Frederick & Warinner states that it has no preference as to which interpretation is affirmed by the Commission.

4. Frederick & Warinner observes that the Commission's discussion of the apportionment of reserves and deferred credits in the *Part 69 Conformance Order* [4] may indicate that reserves and deferrals are not to be treated under Section 69.302 and apportioned on the basis of the related plant accounts. Frederick & Warinner also notes, however, that the Part 69 rules adopted in the *Part 69 Conformance Order* do not indicate specifically that reserves and deferred credits should be included in Other Investment under Section 69.309. Thus, Frederick & Warinner suggests that formal clarification is necessary and appropriate in order to eliminate industry uncertainty and facilitate consistent allocation of reserves and deferred credits among all telephone companies.

III. DISCUSSION

5. Frederick & Warinner's request allows us to clarify whether depreciation reserves and deferred credits should be apportioned in accordance with the instructions contained in Section 69.302, which call for apportionment based on related primary plant account or category, or the requirements of Section 69.309, which provide for apportionment based on combined investment. While the Part 69 rules do not provide specific guidance on this issue, in our view the rules contemplate treating reserves and deferred credits under Section 69.302. Thus, depreciation reserves and deferred credits are to be segregated along with related investment among specific categories as identified in Sections 69.303 through 69.309, and apportioned in accordance with the instructions contained in those sections.

6. This view is based on an overall reading of Subpart D of Part 69, which addresses the role of net investment in computing interstate access charges. Subpart D is entitled Apportionment of Net Investment. Section 69.301(a), which contains general instructions for the entire subpart, provides that "net investment as defined in § 69.2(z) shall be apportioned among the interexchange category, the billing and collection category and access elements as provided in this subpart."[5] Thus, the primary focus of Subpart D is on the apportionment of *net* invest-

ment; viewed in this context, we think the rules contemplate that depreciation reserves and deferred credits should be treated in the same manner as the related primary plant accounts or categories.

7. As Frederick & Warinner observes, in the *Part 69 Conformance Order* the Commission appeared to decline to adopt the view advocated by certain commenting parties that reserves and deferred credits should be apportioned on the basis of primary plant accounts.[6] The language in the *Part 69 Conformance Order* appears to be inconsistent with the overall focus of Subpart D on net investment. However, to the extent that the Commission may have intended to direct carriers to treat reserves and deferred credits in a different manner than related investment, this approach is not in any way incorporated or reflected in the rules contained in Subpart D. Neither Section 69.309 nor Section 69.302 contains any indication that reserves and deferred credits should be treated in such a manner. Under these circumstances, we believe carriers should follow the prescribed Part 69 rules when accounting for reserves and deferred credits. This request for declaratory ruling presents an opportunity to provide carriers specific guidance as to our view of the correct application of the access charge rules. As mentioned above, we believe a logical reading of Subpart D indicates that reserves and deferred credits properly should be treated in a manner consistent with the treatment of related investment. Therefore, we rule that depreciation reserves and deferred credits are properly treated under Section 69.302 and apportioned on the basis of related investment categories or accounts.[7]

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Sections 0.291 and 1.2 of the Commission's rules, 47 U.S.C. §§ 0.291, 1.2 (1989), that the Request for Declaratory Ruling filed by Frederick & Warinner IS GRANTED and the apportionment of depreciation reserves and deferred credits under Part 69 of the Commission's rules IS CLARIFIED as set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. § 69.302 (1989).

[2] 47 C.F.R. § 69.309 (1989).

[3] Those sections are captioned as follows: Section 69.303, Information origination/termination equipment (IOT); Section 69.304, Subscriber line cable and wire facilities; Section 69.305, Carrier cable and wire facilities (C&WF); Section 69.306, Central office equipment (COE); Section 69.307, General support facilities; Section 69.308, Equal access equipment; and Section 69.309, Other investment. *See* 47 C.F.R. §§ 69.303-69.309 (1989).

[4] Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform it with Part 36, Jurisdicational Separations Procedures, 2 FCC Rcd 6460 (1987) (*Part 69 Conformance Order*), *reconsideration*, 4 FCC Rcd 765 (1988).

[5] 47 C.F.R. § 69.301(a) (1989). Section 69.2(z) essentially defines net investment as gross investment minus applicable reserves: "'[n]et investment' means allowable original cost investment in Accounts 2001 through 2003, 1220 and 1402 that has been apportioned to interstate and foreign services pursuant to the *Separations Manual* from which depreciation, amortization and other reserves attributable to such investment that has been apportioned to interstate and foreign services pursuant to the *Separations Manual* have been subtracted . . . ." 47 C.F.R. § 69.2(z).

[6] *See Part 69 Conformance Order*, 2 FCC Rcd at 6460.

[7] Those reserves and deferred credits associated with residual investment as defined in Section 69.309, of course, are properly apportioned in accordance with the requirements of that section (*i.e.*, based on combined investment).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

IDB AERONAUTICAL COMMUNICATIONS, INC. File No. I-T-C-90-088

For authority pursuant to Sections 503 and 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934 to provide aeronautical and maritime mobile satellite service via the INMARSAT system

CICI, Inc. File No. CSG-90-042-ML

For authority under Section 504(c)(4) of the International Maritime Satellite Communications Act of 1978 and Title III of the Communications Act of 1934, to modify its earth station KA-76 at Niles Canyon (Fremont), California to provide aeronautical and maritime mobile satellite service via the INMARSAT system

CICI, Inc. File No. CSG-90-084-ML

For authority under Section 504(c)(4) of the International Maritime Satellite Communications Act of 1978 and Title III of the Communications Act of 1934, to modify its earth station KA-63 at Niles Canyon (Fremont), California to provide aeronautical and maritime mobile satellite service via the INMARSAT system

CICI, Inc. File No. CSG-90-085-ML

For authority under Section 504(c)(4) of the International Maritime Satellite Communications Act of 1978 and Title III of the Communications Act of 1934, to modify its earth station KA-227 at the Teleport on Staten Island, New York to provide aeronautical and maritime mobile satellite service via the INMARSAT system

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: April 26, 1991; Released: May 8, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. IDB Aeronautical Communications, Inc. (IDB-A), and its affiliate, CICI, Inc. (CICI), filed the above-captioned applications requesting authority pursuant to Sections 503 and 504(c) of the International Maritime Satellite Communications Act of 1978, 47 U.S.C. §§ 752 and 753(c), and Section 214 and Title III of the Communications Act of 1934, as amended, 47 U.S.C. §§ 214 and 301 *et seq.*, to provide aeronautical and maritime mobile satellite service via the INMARSAT system, and to modify the Niles Canyon, California, INTELSAT earth stations (KA-76 and KA-63) and Staten Island, New York, INTELSAT earth station (KA-227) to provide aeronautical mobile satellite service (AMSS) and maritime mobile satellite service (MMSS) via the INMARSAT system. The first two above-listed applications were placed on public notice on April 11, 1990, and the latter two on July 20, 1990. Pan American Satellite (PAS) and Aeronautical Radio, Inc. (ARINC) filed comments. IDB-A and CICI (Applicants) filed a consolidated reply. PAS replied to the consolidated filing. The Applicants filed additional information pursuant to a Common Carrier Bureau request. For the reasons set forth below, we grant the applications, subject to certain conditions.

II. THE APPLICATIONS

2. In application File No. I-T-C-90-088, IDB-A seeks authority to provide AMSS and MMSS between the ground earth stations listed above and aircraft in international flight and ships accessing INMARSAT, and to provide other such uses of the INMARSAT system as may be authorized by the Commission. IDB-A requests blanket authority to provide Pacific Ocean Region (POR) and Atlantic Ocean Region (AOR) MMSS and AMSS via all present and future INMARSAT owned or leased satellites. In applications File Nos. CSG-90-042-ML (Call Sign KA-76, 13.1 meter antenna), CSG-90-084-ML (Call Sign KA-63, 13.1 meter antenna), and CSG 90-085-ML (Call Sign KA-227, 13.1 meter antenna), CICI seeks authority to modify three of its INTELSAT earth stations to provide AMSS and MMSS via the INMARSAT system. The ground earth stations will have the capability to communicate with INMARSAT POR, AOR-West, and AOR-East satellites, respectively.

3. The Applicants state that AMSS will include slow and high speed cockpit data services, digitally encoded voice services for flight operations, airline administrative traffic, air traffic service, automatic dependent surveillance, and passenger voice communications. MMSS will include analog voice, telex, digital data, and compressed video.

4. The Applicants also state that grant of these applications will permit them to offer services that will greatly improve maritime and aviation communications, including the introduction of satellite communications to aircraft in transoceanic flight, which will further aviation safety, improve the efficiency of airline operations, and,

for the first time, offer voice and data communications to transoceanic airline passengers. The Applicants state that competition will increase service options to the public, improve overall service and reduce charges.

5. The application states that IDB-A will lease the use of the earth stations from IDB Communications Group, Inc. (IDB-CG).[1] It claims that operating costs cannot be estimated at this time because the cost of the space segment has not been determined, nor has the size of the market, although IDB-A believes that there is an increasing demand for these services. IDB-A states that charges and regulations governing its services will be specified in one or more tariffs which will be filed with the Commission to the extent required by law.

6. By amendment dated May 9, 1990, the Applicants emphasize that their provision of AMSS and MMSS will be consistent with the Commission's decisions in CC Docket No. 87-75[2] and Gen. Docket No. 84-1234. [3] In further amendments, the Applicants state that they do not seek to be regulated as non-dominant carriers, and thus request that they be deemed dominant with respect to the provision of international mobile satellite communications services. They also acknowledge that the Communications Satellite Corporation (Comsat) is the sole U.S. signatory and operating entity for INMARSAT mobile satellite services, and that the carrier-to-carrier relationship between Comsat and the Applicants will be consistent with the International Maritime Satellite Telecommunications Act of 1978.

III. COMMENTS AND REPLIES

7. In its comments, PAS contends that IDB-A and IDB-CG are commonly owned. According to PAS, IDB-CG is 20 percent owned by Teleglobe Canada and has two Canadian citizens on its nine-member board. In addition, PAS argues that the proposed aeronautical service is related to a joint venture between IDB-A and Teleglobe Canada to provide these services in North America. PAS thus concludes that IDB-A is foreign-owned and subject to regulation as a dominant carrier. Furthermore, PAS alleges that Teleglobe Canada has effectively prevented PAS from providing service between Canada and Europe and between Canada and Latin America, and that the Commission should evaluate this market access issue in ruling on IDB-A's applications. PAS maintains that the Commission should be wary of Teleglobe Canada's efforts to expand its presence in the U.S. while effectively keeping its Canadian market closed to U.S. separate systems.

8. ARINC also asks that IDB-A be classified as dominant, and that IDB-A be required to comply with all of the reporting and disclosure obligations, facilities licensing requirements, and service initiation and discontinuance obligations associated with dominant-carrier status.[4]

9. The Applicants reply by first observing that neither ARINC nor PAS opposed their applications. They therefore request the Commission to grant the applications expeditiously to allow a second U.S. company into the highly competitive world market for international mobile satellite communications services. The Applicants restate their intention to be regulated as dominant carriers. With respect to the PAS comments, the Applicants assert that the Commission has no jurisdiction to consider the policies of Teleglobe Canada with respect to international communications between Canada and nations other than the U.S. Even if it did, the Applicants allege that the Commission would retain adequate regulatory oversight by exercising dominant-carrier procedures.

10. In its response to the Applicants' reply, PAS disputes that the Commission lacks jurisdiction to consider services between two foreign countries. PAS argues that the Commission's interest is in ensuring generally that markets are not manipulated in such a way as to harm U.S. carriers, including U.S. separate satellite system providers. PAS asks the Commission to exercise its dominant carrier regulation by adding conditions on IDB-A's Section 214 authorization to encourage IDB-A's affiliate, Teleglobe Canada, to open the Canadian market to U.S. separate satellite systems.

IV. ADDITIONAL INFORMATION

11. In response to a December 6, 1990, inquiry from the Common Carrier Bureau, the Applicants filed additional information indicating IDB-A's intention to use the three above-referenced earth stations operated by CICI in the provision of aeronautical and maritime mobile satellite services in the AOR and POR. IDB-A will provide MMSS pursuant to its tariff which covers "service between a ship earth station and a station located in the United States and Canada." IDB-A explains that "station" when applied to a land location means a telephone number, not a satellite earth station.

12. The Applicants further explain that the three earth stations will be operated and controlled by CICI with equipment furnished by IDB-A. CICI, an established common carrier with numerous Title II and Title III authorizations, will provide ground/coast earth station services to IDB-A pursuant to carrier-to-carrier agreements. CICI will not offer maritime or aeronautical services to the public and, thus, will not file a tariff for such services.

13. IDB-A states that it seeks Title II authorization to offer service to the public as a common carrier. IDB-A has filed a tariff covering MMSS and will file a tariff covering AMSS in the near future. Finally, IDB-A states that it is a joint venture owned 50 percent by IDB Aeronautical Holdings, Inc., a wholly-owned subsidiary of IDB-CG, a Delaware Corporation, and 50 percent by TII Aeronautical Corporation (TII), which is a wholly-owned subsidiary of Teleglobe International, Inc., which is ultimately a wholly-owned subsidiary of Memotec Data, Inc., a Canadian corporation. Teleglobe International (U.S.), Inc., is an affiliate of Teleglobe Canada, Inc. IDB-A lists three of its six directors as Canadian citizens and two Canadian citizens as officers.

V. DISCUSSION

14. In CC Docket No. 87-75, one of the Commission's objectives was to promote competition in the provision of INMARSAT international aeronautical services.[5] The Commission directed that Comsat acquire space segment capacity from INMARSAT and provide that capacity both to aeronautical customers using Comsat aeronautical earth stations and to U.S. service providers operating their own aeronautical earth stations. The Commission emphasized that Comsat would not be the only service provider for aeronautical earth station services. The arrangements

adopted for international aeronautical services were intended to enable other service providers to make full service offerings to their customers.[6]

15. The Commission further noted that both the Maritime Satellite Act and Commission policy permit entities other than Comsat to operate coast earth stations with the INMARSAT system to provide maritime mobile satellite service.[7] Section 503(f) of the International Satellite Maritime Communications Act, 47 U.S.C. 752(f), provides that the Commission may authorize ownership of satellite earth stations by entities other than Comsat for the provision of maritime satellite services. In *Implementation of Requirements of the International Maritime Satellite Telecommunications Act*, 91 FCC 2d 245, 251 (1982), the Commission adopted a general policy to permit persons other than Comsat to own earth stations accessing the INMARSAT space segment if such persons make a showing that such ownership will be in the public interest.

16. Accordingly, we need not consider the legal and policy implications of allowing persons other than Comsat to own earth stations for maritime and aeronautical use of the INMARSAT system; we need only determine that the applications are consistent with the Commission's policy decisions and the public interest. For the following reasons, we find that IDB-A's and CICI's applications are consistent with Commission policy and the public interest standard and therefore should be granted, subject to certain conditions.

17. Initially, we find that the provision of INMARSAT aeronautical services by the Applicants will serve the public interest. The Commission's goal of promoting competition in the provision of INMARSAT aeronautical services will be advanced by grant of these applications. It will permit competition in transoceanic aeronautical services that should increase service options to the public, improve overall service, and reduce charges.

18. We also find that the Applicants' proposal to provide maritime services will serve the public interest. It will advance the Commission's general policy to promote competition in the provision of maritime communications services in the manner contemplated by Congress.[8]

19. Moreover, most of the issues raised by ARINC and PAS have been resolved by the Applicants' amendments which recognize their status as dominant carriers and by their supplemental information regarding ownership.[9] The earth stations will be operated and controlled by CICI, a fully qualified common carrier. CICI's obligations as outlined in the contracts indicate that it is the appropriate licensee for the earth stations, and that its holding of the licenses will comply with Title III of the Communications Act. The contracts are consistent with the representations made in the applications themselves.

20. In the *International Competitive Carrier* proceeding,[10] the Commission determined that foreign-owned carriers should be considered dominant in the provision of international telecommunications services in order to address the concern that foreign telecommunications entities could favor the U.S. carriers in which they held a financial interest and, operating in concert with these carriers, could deny market entry to, or discriminate against, competing U.S. carriers. The Commission concluded that, for the purposes of the international competitive carrier policies, a foreign-owned carrier would be defined as a carrier that is over 15 percent directly or indirectly owned by a foreign telecommunications entity or on whose board a representative of a foreign telecommunications entity sits. IDB-A, which seeks authorization under Title II of the Communications Act, is 50 percent owned by a foreign telecommunications entity and, therefore, is dominant under *International Competitive Carrier*.

21. IDB-CG already has been found to be dominant in the provision of all services because Teleglobe International (U.S.), Inc. owns 20 percent of IDB-CG's stock and designates two of the nine directors of IDB-CG's board.[11] CICI is a wholly-owned subsidiary of IDB-CG. We also note that CICI, as a provider of INTELSAT services, is already dominant under the provisions of the *International Competitive Carrier* decision.

22. We continue to support the efforts of PAS and other U.S. companies to gain entry into the Canadian market. We would be concerned about imposition of any restrictions that would not permit U.S. service providers to compete fairly.[12] PAS has failed to show why classification of IDB-A and CICI as dominant carriers will not provide sufficient safeguards against unfair practices. However, we do not foreclose the possibility of appropriate Commission action at a later date if U.S. service providers are not permitted to compete fairly.

23. As conditions on the grant of these applications, we will limit the Applicants' provision of aeronautical mobile satellite services to aircraft in international flight as defined by the Commission in CC Docket No. 87-75. In that decision, the Commission said that it would authorize the use of INMARSAT aeronautical services via U.S. aeronautical earth stations for aircraft in flight: (1) from the United States to a foreign point; (2) from a foreign point into the United States; and (3) between any two foreign points.[13] In addition, the Applicants will be required to comply with any arrangements that will be established for handing-off traffic between INMARSAT and a domestic system for both AMSS(R) and non-AMSS(R) communications. The Commission has left development of the specifics of these hand-off arrangements to the satellite operators. Of course, the Applicants will be expected to comply with all other aspects of the Commission's decisions in CC Docket No. 87-75, including maintaining a carrier-to-carrier relationship with Comsat as the sole U.S. signatory and operating entity in INMARSAT for U.S. space segment.

24. The INMARSAT first- and second-generation satellites have been authorized by the Commission to utilize the 5925-6443 MHz[14], 3600-3623 MHz, and 3700-4200 MHz bands for feeder links and the 1530-1548 MHz and 1626.5-1649.5 MHz L-band frequencies for maritime and aeronautical mobile services. The internal Commission coordination of CICI's transmitting and receiving frequency C-band feeder links for INMARSAT second-generation satellites with other services has also been completed. Therefore, CICI's ground earth stations shall be authorized to use these frequency bands. However, we will defer action on CICI's request to use INMARSAT third-generation satellite frequency bands which are not included in first- and second-generation satellites. Therefore, we will not authorize at this time the use of 1649.5-1660.5 MHz, 1548-1559 MHz, 6443-6454 MHz, or 3623-3629 MHz.

25. Moreover, for operations with second-generation INMARSAT satellites, the Applicants' use of test aircraft earth station (AES) facilities has been coordinated with the National Telecommunications and Information Administration (NTIA) for the L-band frequencies:

1626.5-1649.5 MHz and 1530-1548 MHz.[15] However, the Commission has not adopted standards for AES equipment.[16] Nevertheless, in view of the Commission's policy to introduce international aeronautical services via INMARSAT at an early date, we will authorize the Applicants' use of the AES equipment for the provision of frequency translation error correction, testing, and network coordination purposes conditioned on the Applicants making necessary modifications at a later date to comply with standards adopted by the Commission.

VI. ORDERING CLAUSES

26. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §§ 752 and 753(c), IT IS ORDERED that the application of IDB Aeronautical Communications, Inc., File No. I-T-C-90-088, IS GRANTED and IDB-A is authorized to acquire INMARSAT space segment capacity from Comsat and to lease capacity in CICI's ground earth stations at Niles Canyon, California, and Staten Island, New York, and use such facilities to provide:

(i) maritime mobile satellite services to ships in the AOR and POR via INMARSAT satellites; and

(ii) international aeronautical mobile satellite services in the AOR and POR via INMARSAT satellites consistent with CC Docket No. 87-75 and Gen. Docket No. 84-1234.

27. IT IS FURTHER ORDERED, pursuant to Title III of the Communications Act of 1934, as amended, and Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §§ 752 and 753(c), that the applications of CICI, Inc., File Nos. CSG-90-042-ML, CSG-90-084-ML, and CSG-90-085-ML, ARE GRANTED to the extent provided in this Order and CICI is authorized to install and operate equipment at both its Niles Canyon, California (KA-76 and KA-63) and Staten Island, New York (KA-227) ground earth stations in order to provide international maritime and aeronautical mobile satellite services via the INMARSAT first and second generation satellite system subject to the conditions specified below and on the frequency bands listed in paragraph 24 above.

28. IT IS FURTHER ORDERED as provided in paragraph 24, above, that action on the portion of the CICI applications requesting authority to modify existing earth stations to operate with the INMARSAT third generation satellites extended frequency bands IS HEREBY DEFERRED.

29. IT IS FURTHER ORDERED that IDB-A shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, file a tariff for the services authorized in this order before offering services to the public.

30. IT IS FURTHER ORDERED that this grant is conditioned, as discussed in n. 9, *supra*, upon CICI's filing of an application under Section 214 of the Communications Act for authorization as a common carrier and the filing of a tariff under Section 203 of the Communications Act.

31. IT IS FURTHER ORDERED that IDB-A IS CLASSIFIED AS DOMINANT in its provision of all international services via the INMARSAT system to all points.

32. IT IS FURTHER ORDERED that the Applicants' authorization to use test aircraft earth station equipment is limited to frequency translation error correction, testing, and network coordination purposes and is subject to future modification to assure compliance with any Commission standards concerning these units.

33. IT IS FURTHER ORDERED that CICI shall provide the Society of Broadcast Engineers' frequency coordination group in the relevant geographical area with a copy of its ground earth station proposal with respect to frequency usage above 6425 MHz.

34. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, CICI shall provide the Commission with a summary of equipment which was actually installed.

35. IT IS FURTHER ORDERED that the Applicants shall provide aeronautical satellite service only to aircraft in international flight as defined in the Commission's decision in CC Docket No. 87-75.

36. IT IS FURTHER ORDERED that the Applicants shall comply with established arrangements for handing-off aeronautical traffic between the INMARSAT system and a domestic system in accordance with the Commission's decision in CC Docket No. 87-75.

37. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the INMARSAT satellite system.

38. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] A later contract assigned all of IDB-CG's rights and responsibilities to CICI. Thus, as now proposed, IDB-A will lease the use of the earth stations from CICI.

[2] Provision of Aeronautical Services via the INMARSAT System, 4 FCC Rcd 6072 (1989).

[3] Amendment of Parts 2 and 22, *Report and Order*, Gen. Docket Nos. 84-1231, 84-1233, and 84-1234, 2 FCC Rcd 1825 (1986); *recon. denied* 2 FCC Rcd 6830 (1987); *recon. denied* 4 FCC Rcd 6016 (1989); *Second Report and Order*, Gen. Docket No. 84-1234, 2 FCC Rcd 485 (1986); *recon. denied* 4 FCC Rcd 6029 (1989); *Memoramdum Opinion, Order and Authorization*, 4 FCC Rcd 6041 (1989); *remanded sub nom.* Aeronautical Radio, Inc. v. FCC, No. 88-1009 (D.C. Cir. March 19, 1991).

[4] ARINC also reminds the Commission that in CC Docket No. 87-75, IDB-A advocated direct access to the INMARSAT system, and made a late proposal concerning structural separation of

Comsat's INMARSAT-related space and ground segment activities. ARINC accuses IDB-A of jeopardizing the timely initiation of INMARSAT aeronautical services in the U.S. and the ability of U.S. companies to compete in their own markets. ARINC also claims that IDB-A is positioning itself to access INMARSAT capacity in the U.S. at wholesale rates while other U.S. companies are obligated under long term contracts with Comsat at retail rates. The Applicants respond that in that docket, IDB-A has withdrawn its request for direct access and for Comsat restructuring. Thus, IDB-A reasons that ARINC's concerns have been met.

[5] Provision of Aeronautical Services via the INMARSAT System, 4 FCC Rcd at 6080.

[6] *Id.* at 6083.

[7] *Id.*

[8] *Implementation of Requirements of the International Maritime Satellite Telecommunications Act*, 91 FCC 2d at 252.

[9] We note that in its June 1, 1990, amendments, CICI, in order to address the concerns of PAS and ARINC, requested that the grant of its application be conditioned upon its being deemed a dominant carrier. CICI, however, has not filed a Section 214 application or a tariff. We are therefore conditioning the grant of these applications on CICI's filing such an application and tariff.

[10] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986).

[11] *See* December 21, 1989 letter to Robert S. Koppel, Director, Legal and Regulatory Affairs, IDB Communications Group, Inc., File No. CSG-90-015-AL.

[12] We are also concerned by recent efforts of Teleglobe to restrict the use of transborder services between the United States and Canada, but note that in our view any such Canadian-imposed restrictions on U.S. carriers that may be contained in operating agreements for service between the United States and Canada would be considered as inapplicable in the United States. *See, e.g.*, Letter from Robert Seguin, Vice-President Policy Planning and International Affairs, Teleglobe Canada, to Secretary, FCC (August 16, 1990). *See also* Petition of Telecom Canada and Teleglobe Canada, Inc., to Suspend and Investigate AT&T Communications Tariffs F.C.C. Nos. 1 and 9, Transmittal No. 2409 (August 27, 1990). *See* Letter from John Cimko, Chief, Tariff Division, to C.E. Link, AT&T (August 27, 1990).

[13] *See* Provision of Aeronautical Services via the INMARSAT System, 4 FCC Rcd at 6078-79. We will not at this time authorize the Applicants to use U.S. earth stations to provide INMARSAT aeronautical service to aircraft in flight between two U.S. domestic points pending further proceedings in Gen. Docket No. 84-1234 and Commission action on various pending interim AMSS and land mobile satellite service (LMSS) applications. Applicants will of course be expected to comply with further proceedings in Gen. Docket No. 84-1234.

[14] INMARSAT second-generation satellites were constructed and authorized to operate on the feeder-link bands 6425-6443 MHz and 3600-3623 MHz. First generation INMARSAT satellites consisted of leased packages from existing satellites which were operating its feeder links in the standard fixed satellite C-bands, 5925-6425 MHz and 3700-4200 MHz. As a result of coordination of the INMARSAT second generation satellite shared frequency band 6425-6443 MHz, the Mass Media Bureau has requested that the Applicants also provide the Society of Broadcast Engineers' frequency coordination group in the relevant geographical area with a copy of their earth station proposals. We shall therefore condition our authorization to include this requirement.

[15] We note that the Commission has already granted an interim waiver of the Table of Frequency Allocations to allow the use of certain L-band frequencies presently allocated for maritime mobile satellite service for AMSS(R) operations with first generation INMARSAT satellites. Communications Satellite Corporation and American Mobile Satellite Corporation Requests for Interim Waiver of Section 2.106 of the Commision's Rules to Provide AMSS(R) and MSS Services in the Maritime Bands 1530-1544 MHz and 1626.5-1645.5 MHz, 5 FCC Rcd 4117 (1990).

[16] *See* Notice of Proposed Rule Making in PR Docket No. 90-315, *Amendment of Part 87 of the Commission's Rules to Establish Technical Standards and Licensing Procedures for Aircraft Earth Stations*, 5 FCC Rcd 3933 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

DIAL-NET, INC. File No. I-T-C-91-081

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 26, 1991; Released: May 8, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Dial-Net, Inc.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-081 IS GRANTED, and Dial-Net, Inc. is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant's request for waiver is hereby denied and that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant's request for waiver is hereby denied and the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-297

In the Matter of

Thomas L. Root, Esquire

Request for Compensation
Under the Equal Access to
Justice Act.

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1991; Released: May 8, 1991

By the Commission:

1. We have under consideration a petition filed by Thomas L. Root, pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, requesting compensation for fees and costs that Mr. Root incurred to obtain a judicial stay of his interim suspension from the practice of law before the Commission. *See Thomas L. Root, Esquire*, No. 90-278, (D.C. Cir., June 6, 1990).

2. Mr. Root's claim arises from a *Show Cause* proceeding we initiated to determine whether he should be permanently disbarred pursuant to section 1.24 of the rules, 47 C.F.R. § 1.24, in view of his disbarment by consent by the District of Columbia Court of Appeals. *See Thomas L. Root, Esquire*, General Docket No. 90-297, released May 25, 1990; *see also Thomas L. Root*, BDN117-89, decided April 12, 1990. As an interim measure, we temporarily suspended Mr. Root from practice before the Commission pending the completion of the *Show Cause* proceeding. Following the Court's grant of his Motion for Stay, Mr. Root responded to the *Show Cause Order*, but did not contest his disbarment by the Commission. After due consideration, we permanently disbarred Mr. Root, effective July 6, 1990. *See Thomas L. Root, Esquire*, General Docket No. 90-297, released June 28, 1990.

3. We deny Mr. Root's petition since neither our *Show Cause* proceeding nor his temporary suspension comes within the purview of the EAJA. Section 504(a)(1) of the EAJA limits compensation to fees and costs incurred in "adversary adjudications," which are defined as adjudications "under section 554" of the Administrative Procedure Act, 5 U.S.C. § 554. *See* 5 U.S.C. § 504(b)(1)(C). By its terms, section 554 applies only to "adjudication[s] required by *statute* to be determined on the record after opportunity for an agency hearing." *See* 5 U.S.C. § 554(a) (emphasis added).

4. In the proceedings involving Mr. Root, no statute mandated the conduct of an "on the record" proceeding concerning his qualifications to practice law before the Commission. Rather, we initiated the *Show Cause* proceeding and suspended Mr. Root from practice pursuant to section 1.24 of our rules and our general authority to conduct our proceedings in an efficient manner. *See* 47 C.F.R. § 1.24; 47 U.S.C. §§ 154(i) and (j). As a consequence, Mr. Root's temporary suspension was not "an adjudication required by statute to be determined on the record" and, therefore, was not an "adversary adjudication" as defined in the EAJA. *See St. Louis Fuel and Supply Co., Inc. v. F.E.R.C.*, 890 F.2d 446 (D.C. Cir. 1989). As the relief afforded under the EAJA is not available to Mr. Root, it is unnecessary to reach the merits of his claim.

5. Accordingly, IT IS ORDERED That the petition filed by Thomas L. Root pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-122

In the Matter of

Commission Policies
Regarding Spousal Attribution

NOTICE OF INQUIRY

Adopted: April 12, 1991; Released: May 8, 1991

Comment Date: July 2, 1991
Reply Comment Date: August 2, 1991

By the Commission:

INTRODUCTION

1. We are initiating this *Notice of Inquiry* (NOI) on our own motion to solicit comment on application of our spousal attribution policy, pursuant to which the media interests of one spouse are presumptively attributed to the other spouse in applying our multiple ownership and cross-ownership rules (ownership rules).[1] In view of the steady increase in the number of married couples with dual careers and recent cases raising the spousal attribution issue, we seek to develop a Policy Statement clarifying the circumstances in which a spouse's media interests will be attributed to the other spouse. Under our proposed guidelines, we would presumptively not attribute one spouse's media interests to the other for purposes of our ownership rules when there are sufficient indicia of independence with regard to each spouse's media interests. We believe that such guidelines will serve the public interest by not unduly restricting married couples from pursuing independent media careers, yet preserve the purpose of the spousal attribution policy by ensuring armslength competition and promoting program diversity.

BACKGROUND

2. Our presumption of spousal attribution was stated in 1976 in *Lady Sarah McKinney-Smith and J. Shelby McCallum*.[2] In that case, the licensees of two stations with overlapping signals desired to marry, and petitioned the Commission for a declaratory ruling that the marriage would not subject either station to the multiple ownership rules and require divestiture of one of the stations. The Commission held that a husband and wife owning, operating, or controlling two stations with overlapping contours in the same broadcast service would have the interest of each presumptively attributed to the other. The Commission's rationale for establishing this presumption, which differed from its treatment of other familial relationships, was that the normally close relationship and community of interest between a husband and wife could be expected to dampen economic competition between stations owned by spouses in the same market.[3]

3. Notwithstanding its determination that a marital relationship would result in a presumptive attribution of each spouse's interests to the other, in *McKinney-Smith* the Commission proceeded to waive the multiple ownership rules because: (1) no acquisition of a license was involved (both parties held their respective interests before marrying); (2) the total number of stations owned was less than permitted a single owner; (3) the circumstances demonstrated a clear lack of intent to evade the multiple ownership rules; (4) the parties agreed to enter into a formal agreement to ensure that each would continue to independently control his or her station;[4] and (5) a large number of similar requests was unlikely to result.[5]

4. Subsequently, in *Attribution of Ownership Interests*, we ruled that for corporate licensees, all officers, directors, and holders of five percent or more of voting stock (ten percent for certain passive investors) are considered to have attributable interests for purposes of the ownership rules. In reconsidering and clarifying these rules, we stated for the first time that in situations in which a marital relationship is involved, rebuttal of the spousal attribution presumption would be permitted on a case-by-case basis in "appropriate circumstances."[6] Although we did not elaborate on what might constitute "appropriate circumstances" for rebuttal, in later cases the Mass Media Bureau, the Review Board, and the Commission all applied the analytical framework established in *McKinney-Smith* when considering waivers of the ownership rules or rebuttal of the spousal attribution presumption.

5. In *Richard R. Zaragoza and Lisa R. Mikalonis*[7] the Bureau waived the ownership rules when the spouse of one station owner was promoted to Vice President and General Manager of another station group in the same market. The waiver was based on four findings. (1) As in *McKinney-Smith*, no change of station ownership was at issue and there was no evidence of any attempt to evade the ownership rules. The petition was precipitated by the promotion of one spouse at a station group where she had been employed for a number of years. (2) The respective interests of the spouses were less significant than in *McKinney-Smith*.[8] (3) The spouses proposed to abide by a marital agreement almost identical to that in *McKinney-Smith* that insulated their interests from each other. (4) An "abundance" of broadcast outlets in the area was found to militate against any potential for harm to economic competition.

6. In 1988, the Bureau applied the same analytical criteria to waive the ownership rules in *Alan C. Campbell & Robert B. Jacobi*.[9] In this case the vice president and general manager of one station married the vice president and general manager of two other stations in the same market. The waiver stated that (1) the request was precipitated by events unrelated to the stations; there was no station ownership change at issue, and no apparent attempt to evade the multiple ownership rules; (2) neither spouse held an ownership interest in the licensees; (3) both spouses executed an agreement similar to that in *McKinney-Smith;* and (4) there was an abundance of other broadcast outlets in the market.

7. In *Marvin J. Diamond and Norman P. Leventhal*[10] the Commission recently applied the same factors in finding for the first time that an applicant had successfully rebutted the spousal attribution presumption. In this case, in-

volving the acquisition by Paramount of an interest in the TVX Broadcast Group owned by The Times Mirror Company, the Senior Vice President and Chief Financial Officer of Paramount was married to the Treasurer of The Times Mirror Company. Although neither spouse was involved directly with the daily operations of their employers' media interests, both were involved at least indirectly. Attribution would have resulted in a number of violations of both the multiple ownership and cross-ownership rules.[11]

8. Unlike the Bureau rulings in *Zaragoza* and *Campbell-Jacobi*, which assumed spousal attribution but waived the ownership rules, the Commission in *Diamond-Leventhal* determined that the spousal attribution presumption was rebutted. The Commission stated that, although a license acquisition was at stake, this distinction was not dispositive because one spouse was neither assisting the other to purchase a media property nor involved with the acquisition or station operation in any manner. The Commission also ruled that the number of other outlets in the markets at issue was irrelevant.[12] It reasoned that in considering rebuttal of the presumption (rather than waiver of the rules), it is the relationships between the spouses themselves and between the spouses and their respective employers that are relevant.

9. The Commission held that the applicants had met the "high standard of review" necessary to rebut the spousal attribution presumption because: (1) both spouses' employers were large, multi-faceted companies with diverse business interests, and neither spouse was exclusively (or even primarily) concerned with his or her company's media interests; (2) neither spouse held a cognizable ownership interest in his or her employer; (3) both spouses had long pursued their independent careers and had not taken any action on their own to precipitate the acquisition that raised the issue; and (4) the spouses agreed to terms similar to those given weight in *Zaragoza*, promising to insulate their business activities from each other.

10. Administrative Law Judges and the Review Board also have relied upon the spousal attribution presumption of *Mckinney-Smith* in applying the diversification criterion in comparative hearings.[13] Recently in *Richard P. Bott, II*[14] the Review Board examined the cases that applied this presumption in the diversification context. Recognizing that the Commission has not specified the "appropriate circumstances" referred to in *Attribution of Ownership* sufficient to rebut the spousal attribution presumption, the Review Board set out the following factors as the minimum showing that might succeed in rebutting the presumption:

> (i) that the spouse seeking to avoid attribution of the other's media interests demonstrate no prior interest or involvement by the other spouse in those media properties; (ii) that the applicant spouse show a history of individual and separate business interests; (iii) that the applicant spouse is the sole financial force behind the application; (iv) that the non-applicant spouse has not participated in the application process and will not participate in station affairs in any way; and (v) that the non-applicant spouse holds no current equity interest in the applicant entity, either active, passive, or through any form of joint ownership.[15]

DISCUSSION

11. As an initial matter, we note that there has been a significant increase in the number of married couples in which both spouses pursue separate and independent careers. This has resulted, and we believe will continue to result, in spousal attribution issues being raised in cases before us. For example, these issues arise when marriage is contemplated by two persons who have pursued independent careers with two different companies that own media serving the same geographic area, or when mergers or aquisitions put spouses with independent careers in the position of holding attributable media interests that would violate the Commission's ownership rules. We are concerned that our spousal attribution policy not unduly restrict married persons from pursuing separate and independent media careers. Accordingly, we are proposing to adopt a Policy Statement to clarify the circumstances under which we will attribute one spouse's media interests to the other spouse.

12. We propose that, for the purpose of applying the Commission's ownership rules, a presumption of no spousal attribution operate when the spouses demonstrate a history of separate business interests and independent careers, and expressly represent that this past independence will continue. Indicia of such independence might include, but are not limited to, a showing that neither spouse holds a financial interest in his or her spouse's employer or its communications subsidiary; that neither is involved in providing services for, or on behalf of the other spouse's media company; and neither is involved in the management, operation, or finances of the other spouse's media company. We would expect, at a minimum, that any such representation would clearly state whether and what financial interest or relationship exists between each spouse and the other spouse's employer.

13. We also request comment on whether the application of these criteria should include consideration of the particular type of ownership interest at issue and the circumstances of the specific markets involved. For example, should we require a greater level of assurance as to the spouses's independence where the interests held are in stations in the same service and in the same market than where the spouses's aggregated interests would violate the national multiple ownership limits? Where colocated stations are involved, should the level of alternative service in the markets where the relevant stations operate also affect the showing required?

14. The party seeking to avoid attribution would bear the initial burden of submitting the representation. The facts set forth in the statement would be subject to review by the Commission and challenge by other interested parties. Any challenger would have the burden of showing either that the submitting party does not meet the policy's requirements or that, even if the party satisfies the requirements, the spousal interests still should be attributed for other specific reasons. In contrast to the current situation in which the petitioner or applicant bears the burden of rebutting the presumption of attribution, our proposal would place on the challenger the burden of rebutting a presumption of no attribution when the requirements are met. If a sufficient showing is not made, or is successfully challenged, spousal interests would be presumptively attributed. Under these circumstances the parties would be free, as they are under our

current policy, to seek waiver of the ownership rules or to rebut the presumption, but they would bear the burden of persuasion.

15. We believe that once these requirements are satisfied, we can regard each spouse's media interests as sufficiently independent that attribution of media interests between spouses is unnecessary for purposes of our ownership rules. Given these indicia of independence, the purposes of the spousal attribution policy in the context of our ownership rules -- ensuring continued economic competition among stations and promoting diversity of program viewpoint -- will be preserved. Thus, our proposed guidelines will serve the dual public interest goals of not unduly restricting married couples from pursuing independent careers in media industries, yet continue to ensure the integrity of our ownership rules. We also believe that the proposed burden shifting procedure and more clearly articulated guidelines will promote administrative certainty and efficiency.

16. We seek comment generally on the sufficiency and efficacy of our proposed requirements in establishing a presumption of no spousal attribution for purposes of the ownership rules and on whether the circumstances under which the Commission will presume no spousal attribution should be either more limited or broader in scope than proposed here. Commenters should keep in mind our objective of presuming no attribution only under those circumstances in which it is unlikely that our policies favoring economic competition and diversity of viewpoint will be impaired.

PROCEDURAL

17. *Comment Information.* Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R §§ 1.415, 1.419, interested parties may file comments on or before **July 2, 1991,** and reply comments on or before **August 2, 1991.** To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C.

18. Accordingly, pursuant to Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303 (1988), IT IS ORDERED THAT this Notice of Inquiry IS ADOPTED.

19. For additional further information about this proceeding, contact David Siddall, Policy and Rules Division, FCC Mass Media Bureau, Washington, D.C. 20554, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 47 C.F.R. §§ 73.3555, 76.501 (1989). *See Attribution of Ownership Interests*, 97 F.C.C.2d 997 (1984), *reconsidered in part*, 58 R.R.2d 604 (1985), *further reconsidered*, 1 FCC Rcd 802 (1986).

[2] 59 F.C.C.2d 398 (1976).

[3] *Id.* at 401.

[4] The agreement contained the following five provisions: (1) both spouses will retain individually and apart from the other spouse all rights and title to their broadcast stations so long as the other is engaged in a competing broadcast station; (2) neither spouse shall be privy to the business records or any other records of the other spouse's broadcast station; (3) the spouses will not engage in any cross-over or exchange of staff or equipment between the broadcast facilities; (4) neither spouse will provide or receive financial assistance or gain from the other party's broadcast station; (5) the spouses will continue their respective competitive business efforts so that full competition is maintained between the broadcast stations. *Id.* at 400, n. 6.

[5] *Id.* at 402.

[6] *See Attribution of Ownership Interests*, 58 R.R.2d at 620, 50.

[7] 2 FCC Rcd 5078 (MMB 1987).

[8] In *McKinney-Smith* both spouses were officers, directors, and one hundred percent owners of the stock of their respective stations. By contrast, in *Zaragoza* one spouse was a director and one-third minority shareholder in two stations and vice president, director, and one-fifth minority shareholder in two additional stations. These were equity interests only. The spouse had no involvement in the daily operations of any of the stations. The other spouse held the positions of vice president and general manager at two stations, but had no ownership interest.

[9] Letter from the Chief, Mass Media Bureau (Reply No. 8910-JMS, 1987)

[10] 4 FCC Rcd 8526 (1989).

[11] *Id.*

[12] *Cf. Zaragoza* and *Campbell-Jacobi*, where an "abundance" of other media outlets was a factor in waiving the ownership rules.

[13] *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The spousal attribution presumption also has been addressed in applying the integration credit in comparative hearings. In *Absolutely Great Radio*, 104 F.C.C.2d 1 (1986), for example, the Commission declined to extend to integration cases the presumption of spousal attribution applied in diversification cases. The Commission reasoned that the integration credit concerns the coincidence of legal responsibility for and actual participation in the station, and therefore ownership interests held by a husband and wife ordinarily should be calculated separately for integration purposes. An exception was recognized for cases in which one spouse is the intended actual owner and the other does not participate in station affairs in any way but holds an interest solely for estate planning purposes.

[14] 4 FCC Rcd 4924 (Rev. Bd. 1989), *aff'd on other grounds*, 5 FCC Rcd 2508 (1990).

[15] *Id.* at 4927, 16. While we have recited the history and construction of the spousal attribution presumption in contexts beyond the application of our ownership rules, we do so only in the interest of providing a comprehensive backdrop for our proposals. Our inquiry here is restricted to the application of our spousal attribution policy in applying our ownership rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NEVADA BELL	File Nos. 7486-CF-P-90
	7487-CF-P-90
For Construction Authorizations	7488-CF-P-90
in the Point-to-Point	7489-CF-P-90
Microwave Radio Service	7490-CF-P-90
within the Exchange	7491-CF-P-90
Area of Austin, Nevada	7492-CF-P-90

MEMORANDUM OPINION AND ORDER

Adopted: May 1, 1991; Released: May 9, 1991

By the Chief, Domestic Facilities Division:

I. BACKGROUND

1. Nevada Bell proposes to provide basic telephone service to five locations in rural Nevada using point-to-point microwave radio loop technology on Instructional Television Fixed Service (ITFS) frequencies, 2500 - 2690 MHz. The proposed system is an extension of its existing microwave system based in nearby Austin, Nevada, authorized to Nevada Bell in *Nevada Bell*, 3 FCC Rcd 7217 (Com. Car. Bur. and Mass Med. Bur. 1988), *aff'd* 5 FCC Rcd 5661 (1990). In that decision, the Commission granted Nevada Bell a waiver to use ITFS frequencies in the D and G channel groups to provide basic telephone service for the first time to rural subscriber locations. The Commission found that grant of a waiver was justified because ITFS frequencies in the area are underutilized and likely to remain so, other radio loop technologies available for basic telephone service to rural areas were not suited to the location proposed by Nevada Bell, and use of the ITFS frequencies would not be detrimental to ITFS users. The Commission also found that granting a waiver to Nevada Bell would be in the public interest because it furthers the Commission's goal of universal telephone service.

2. In its instant applications, Nevada Bell proposes to install one additional transmitter at its existing Austin station for transmission toward a new point of communication at Hickison Summit, approximately 16 miles to the east. The Hickison repeater would provide telephone service from Austin to new customer locations.[1] The proposed modification would use the same channel groups (D and G) and the same technology authorized for Nevada Bell's existing microwave system based in Austin.

3. A number of comments have been filed in opposition to the above captioned applications of Nevada Bell. The Rocky Mountain Corporation for Public Broadcasting (RMCPB) filed a formal opposition to Nevada Bell's applications. Informal objections were filed by the Organization of State Broadcasting Executives (OSBE), the National ITFS Association (NITFSA), and jointly by the South Carolina Educational Television Commission, Iowa Public Broadcasting Board, State of Wisconsin - Educational Communications Board, and University of Maine System (Joint States) (hereinafter, collectively the "Petitioners"). Nevada Bell filed a consolidated responsive pleading. The Honorable Richard H. Bryan filed a letter in support of the Nevada Bell proposal.

4. In response to an oral request from Commission staff for additional information, Nevada Bell filed a response on March 19, 1991. NITFSA, RMCPB, and the Joint States filed informal objections to Nevada Bell's response.

II. ARGUMENTS

5. Petitioners argue that Nevada Bell's applications should be denied because its proposal failed to contain a request for waiver of the ITFS frequencies proposed to be used on the system. In addition, Petitioners maintain that Nevada Bell has not demonstrated any justification for grant of such a waiver. RMCPB argues that Nevada Bell cannot rely on the evidence proffered in *Nevada Bell* as justification for grant of a waiver in this proceeding. It argues that the applications require *de novo* review. All Petitioners argue that ITFS frequencies should be reserved for future educational use, and that additional exceptions to the ITFS frequency allocation will result in no frequencies being available for the educational systems which need them. RMCPB contends that use of ITFS frequencies was denied in *Leaco Rural Telephone Cooperative*, 4 FCC Rcd 5341 (Com. Car. Bur. and Mass Med. Bur. 1989), and that this decision requires the denial of requests to use ITFS frequencies for purposes other than educational systems. RMCPB believes the Commission's goal of universal service should not be attained at the expense of the public educational system. RMCPB also argues that use of ITFS channels adjacent to the channels requested by Nevada Bell will be lost. Finally, RMCPB argues that Nevada Bell's application contains several errors, the most significant of which are no response to Item 13 (environmental impact) and a discrepancy in the coordinates for the Hickison Summit transmitter.

6. In its response, Nevada Bell argues that its existing authorization for the Austin ITFS system covers the additional transmitters it proposes because they would be an integrated part of its existing system. Nevada Bell argues that the full facts and legal arguments warranting a grant of its use of two ITFS channels in this area have been accepted as supporting a waiver of the ITFS frequency allocation rules and that if anything, the existence of further demand for basic telephone service from heretofore unidentified individuals in the general Austin area further supports justification for the waiver. Nevada Bell argues that it has not proposed a reallocation of the ITFS band, but only to use a small portion of the band in a remote area where the frequencies are unused and where there are no prospects for future educational needs. In response to the Commission's oral information request, Nevada Bell corrected the errors pointed out by RMCPB, stating no environmental impact exists for the proposed stations and that the Bureau of Land Management has given it a 50 year lease of Hickison Summit for its repeater location. Nevada Bell corrected the coordinates stated in its application for the Hickison Summit repeater.

III. DISCUSSION

7. Nevada Bell's applications will be granted because they represent a *de minimis* extension of the previously authorized system, and no new arguments have been presented that undermine the waiver granted previously. Petitioners' arguments against additional waiver of ITFS band frequencies are inapposite because Nevada Bell has not requested additional frequency allocations. Its proposed station modifications are entirely within the D and G group frequencies already licensed to it. The issue before us is not whether another waiver should be granted, but rather the extent to which Nevada Bell may modify its system within the parameters of the frequency waiver granted to it in *Nevada Bell*.

8. In *Nevada Bell*, the Commission authorized Nevada Bell to use ITFS frequencies, but did not discuss in detail the extent to which the waiver encompassed future additional transmitters. Nevada Bell's original applications did not specifically address the parameters of future system development.[2] Accordingly, we will take this opportunity to clarify the extent of Nevada Bell's station authorization.

9. In granting Nevada Bell's original waiver requests and system authorization, the Commission intended that point-to-point microwave systems and the Basic Exchange Telecommunications Radio Service (BETRS) would provide a conceptual foundation for the proposed ITFS basic telephone system. Station modification requests are routinely granted in both BETRS and most microwave radio services to permit licensees to serve additional customer locations. It was the Commission's intention that such requests would be treated similarly in an ITFS basic telephone system. Petitioners have offered no reason to depart from this processing concept.

10. In considering this issue, we note several uncontested facts. First, no ITFS systems are proposed within at least 125 miles of the Austin central office. Second, Nevada Bell's central office equipment can accommodate 188 subscriber lines, and frequencies may be reused throughout the system with sufficient separation. Third, no entity in or near the Austin, Nevada area opposes grant of Nevada Bell's application; and fourth, Nevada Bell states that mining operations and other remote subscribers are awaiting future telephone service.

11. Accordingly, under the circumstances of the waiver granted for Nevada Bell's Austin system, as described herein, Nevada Bell may serve additional subscriber locations to the full extent of its capacity on the D and G group frequencies. All repeater transceivers and subscriber locations must be located within the Austin Exchange. As long as Nevada Bell uses the previously authorized equipment according to the specifications described in its applications, it need not apply for additional authority to construct or operate new customer locations. However, Nevada Bell must apply for authorization in accordance with Part 21 of the Rules if it proposes any additional repeater transceivers (such as the one proposed for Hickison Summit).

12. Since Petitioners appear primarily concerned that additional frequency reallocations in the ITFS band be avoided, this clarification should assuage their concerns that Nevada Bell's instant proposal or future modifications of the Austin station will result in additional allocations of ITFS frequencies to the Austin station.

IV. ORDERING CLAUSES

13. WHEREFORE, the foregoing premises considered, IT IS HEREBY ORDERED That the Comments in Opposition filed by Rocky Mountain Corporation for Public Broadcasting are DENIED;

14. IT IS FURTHER ORDERED That the applications of Nevada Bell, File Nos. 7486-CF-P-90 through 7492-CF-P-90, inclusive, for modification of its ITFS basic telephone system in the Austin Exchange, ARE GRANTED as of the issue date of this Order.[3]

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division

FOOTNOTES

[1] The locations are Ackerman, Dry Creek, Monitor Ranch, Rowan, and Smokey Joe. All customer locations, both existing and proposed, are located in Lander County.

[2] Nevada Bell did request a waiver from Section 21.707, which relates to temporary fixed locations, to allow it to include new subscriber stations without having to seek Commission approval each time. Instead, individual subscriber stations would be associated with a blanket authorization issued to the related central office station.

[3] Authorization will be issued to Nevada Bell for its station modifications in due course.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-279

In re Applications of

POUGHKEEPSIE BROADCASTING LIMITED	File No. BPH-870331OR
WICRAE EQUITIES LIMITED	File No. BPH-870414KH
POUGHKEEPSIE COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KT
THE KINNEY GROUP	File No. BPH-870415ME

For a Construction Permit
for a New FM Station on
Channel 241A in Poughkeepsie,
New York

MEMORANDUM OPINION AND ORDER

Adopted: April 24, 1991; Released: May 9, 1991

By the Commission:

1. The Commission has before it a decision of the Review Board granting the application of Wicrae Equities Limited for a new FM radio station in Poughkeepsie, New York, and denying the mutually exclusive applications of Poughkeepsie Broadcasting Limited, Poughkeepsie Communications Limited Partnership, and The Kinney Group. *Poughkeepsie Broadcasting Ltd.*, 5 FCC Rcd 3374 (Rev. Bd. 1990).[1] *See also Poughkeepsie Broadcasting Ltd.*, 4 FCC Rcd 6543 (I.D. 1989). We agree with the Board's resolution of this proceeding. However, we believe it desirable to comment on an important issue raised by this case.

I. BACKGROUND

2. The ALJ and the Board disagreed as to the question of whether applicant Poughkeepsie Communications Limited Partnership (Communications) was entitled to credit for integration of ownership into management. Communications is organized as a limited partnership. Its general partner, Thomas H. Cooper, holds a ten percent equity interest and would be integrated full-time into management. Communications also has ten limited partners. Communications was initially organized by its attorney, Lewis Cohen, and limited partner Jean Wells, who recruited Cooper.

3. The ALJ rejected allegations that Communications was not a bona fide limited partnership. In so doing, however, he noted circumstances that cast doubt on the validity of Cooper's nominal position as general partner. 4 FCC Rcd at 6550-51 ¶ 65. He found, for example that: (1) Cooper was not asked to be the general partner until two or three days before the application was due to be filed; (2) Cooper has no financial obligation to the applicant; and (3) Cooper did not establish a partnership bank account until over a year after the partnership was formed, and, prior to that, attorney Cohen handled the partnership's finances. Nonetheless, the ALJ concluded that the partnership was bona fide. He found that Cooper had actively and independently overseen the prosecution of the application, to the limited extent necessary, by, for example, reviewing the application with counsel, preparing three cash call letters, locating a place for the public file, preparing the hearing notice, responding to discovery requests, answering inquiries from the limited partners, and being responsible for the partnership's books. *Id.* at 6547 ¶¶ 34-35, 6550-51 ¶ 65. Conversely, the ALJ found no evidence that any of the limited partners had been actively involved in prosecuting the application.

4. The Board (Chairman Marino dissenting) reversed the ALJ and discounted Communication's organization as a limited partnership. 5 FCC Rcd at 3376 ¶ 9. The Board found that it was not credible that Communication's investors would entrust their investment to someone they knew so little about, or that Cooper would undertake a general partner's unlimited liability without at least negotiating the amount of his partnership share, which Cooper did not do. The Board also found that Cooper showed little concern for the potential size of his personal liability, had no detailed knowledge of the partnership's finances until over a year after the partnership was formed, and that he and Wells never discussed his management duties in detail. In his dissent, Chairman Marino urged that the circumstances surrounding Communication's formation do not undermine the partnership's validity: he stressed that Cooper had broadcast and management experience, that he had actively prosecuted Communication's application and that there is no evidence that the limited partners participated in prosecuting the application. 5 FCC Rcd at 3383-84.

II. DISCUSSION

5. This case implicates concerns about the reliability of applicants' integration proposals that we have encountered several times since we addressed that issue in *KIST Corp.*, 102 FCC 2d 288 (1985). Since that time, we have steadily sought to clarify our policy with respect to these proposals to make our determinations as to their reliability more realistic. Recently, in *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990), we issued a comprehensive statement concerning applicants with defective integration proposals. In some respects, we restated existing case law, but we also adopted certain refinements that were logical outgrowths of prior precedent. In particular, we held that the principle that requires applicants to establish the overall reliability of their integration proposals to obtain comparative credit necessarily applies to the subsidiary question that has recently generated much litigation -- namely, whether the applicant's described ownership structure accurately reflects the manner in which control will be exercised. Among other things, we

stated that when an applicant fails to demonstrate that nominally active principals in a two-tiered entity (such as the general partners in a limited partnership) will be exercising control, the applicant should not receive any integration credit. We noted that we would reach this conclusion when the evidence shows that an applicant was formed in a manner that is irreconcilable with the exercise of sound business judgment -- for example, when it appears that the individuals organizing the applicant are giving away control or ownership in a manner that is patently unreasonable on its face. In these circumstances, it is unrealistic to conclude that an applicant's proposed grant of exclusive and integrated control to nominally active principals is reliable.[2] Thus, integration credit is unwarranted. In addressing the facts of this case, we find that the application of this policy explained in *Royce* is appropriate.

6. We find that Communications' proposal is not reliable. [3] In this case, the Board found that it is not credible that bona fide limited partners would entrust their substantial investment and valuable broadcast property exclusively to an individual they had never met and whose character, business and financial qualifications they had never examined. Conversely, the Board also found that it is not credible that a reasonable general partner would take on unlimited liability for investors he had never met without seeking to negotiate his ownership interest in return for this unlimited exposure. 5 FCC Rcd at 3376 ¶ 9. We agree that the casual manner in which Cooper became involved in Communications runs contrary to reasonable business judgment since, in a legitimate business transaction, one would expect the general partner and the investors to study the situation more carefully before committing themselves.[4] *See* 5 FCC Rcd at 3374-76 ¶¶ 2-9; 4 FCC Rcd at 6546-47 ¶¶ 32-33. Indeed, Cooper admitted that if the situation had been reversed, he probably would not have been willing to go into business with a general partner he did not know. Tr. 1072. When Cooper was repeatedly asked why he signed the limited partnership agreement under the circumstances in which he did, Cooper's answers were unresponsive. Tr. 1074-76. At no point in the record did Cooper explain why he would undertake the financial risk and other burdens of being the general partner of a broadcast venture so casually.

7. In our view, these circumstances severely undermine the reliability of Communication's business structure despite the fact that, according to the record, Cooper was involved in the prosecution of the application after Communications' formation. This case is distinguishable from *Susan S. Mulkey*, 4 FCC Rcd 5520 (1989), where the voting stockholder's active post-formation management of the applicant and the noninvolvement of the nonvoting stockholder established the reliability of the applicant's organization as a two-tiered corporation.[5] Here, Cooper's role in the applicant is less persuasive than was the case in *Mulkey*, where, for example, the active principal helped formulate the applicant's engineering proposal. 4 FCC Rcd at 5521 ¶ 7.[6] Cooper had no role in formulating the applicant's engineering proposal. Tr. 956-57, 1037. Furthermore, at the time he certified Communications' financial qualifications, Cooper appears to have had little knowledge of how Communications would obtain the funds to meet the Commission's financial requirements. Cooper testified that, based on his conversation with Cohen, he had the responsibility for obtaining a bank letter. Tr. 964, 991-92. Actually, unknown to Cooper, Wells had already solicited such a letter. Tr. 967-68, 1147-49. Even at the hearing, Cooper was unsure how construction, as opposed to initial operation, would be financed. Tr. 1003.[7]

8. Moreover, after the formation of Communications, the record reveals a laxness in Communications' observance of partnership formalities. Cooper did not establish a partnership bank account, which was required by the partnership agreement, until over a year after the partnership was formed. Tr. 1010-11, 1084-85. During this period, attorney Cohen handled the partnership's finances using funds contributed by the limited partners before Cooper became involved with the applicant. Tr. 1086. Similarly, when Cohen needed additional funds to pay the $6,000 hearing fee, he did not go to Cooper. Rather, he contacted Wells directly, who made an undocumented loan (which, however, Cooper later repaid from partnership funds). Tr. 1087, 1155-58. The foregoing, coupled with the evidence of the circumstances of Cooper's recruitment as general partner, persuades us that the Board correctly rejected Communications' integration proposal.

III. ORDERS

9. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Applications for Review filed July 6, 1990 by Poughkeepsie Communications Limited Partnership, and July 9, 1990 by Poughkeepsie Broadcasting Limited and The Kinney Group ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) Applications for Review filed July 6, 1990 by Poughkeepsie Communications Limited Partnership and July 9, 1990 by Poughkeepsie Broadcasting Limited and The Kinney Group; and (2) oppositions filed August 10, 1990 by Poughkeepsie Communications Limited Partnership and Wicrae Equities Limited (three pleadings).

[2] Because the applicant has the burden of establishing the validity of its proposal, we will not hesitate to reject a proposal where the applicant's showing is deficient. In this regard, we disavow language in *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 ¶ 19 (1988), to the extent that it could be read as suggesting that a reluctance to second guess an applicant's business judgment would preclude us from evaluating an applicant's claim that its structure is bona fide.

[3] We note that where the applicant's attorney plays a leading role in promoting the formation of an applicant, as is the case here, this circumstance provides reason to closely examine the record to make certain that the nominal active owners truly control the applicant.

[4] In this regard, we disagree with Board Chairman Marino's assertion, made in his dissent, that the Board's decision is inconsistent with *KIST Corp.*, 102 FCC 2d 288, 290-92 ¶¶ 3-6 (1985). Chairman Marino claims that, in rejecting Communica-

tion's proposal, the Board relies on factors that the Commission, in *KIST*, did not consider indicators of a sham proposal. 5 FCC Rcd at 3383. We believe that *KIST* is inapposite. The pertinent issue in *KIST* concerned the bona fides of the gift by an individual named Hodin of a 35 percent interest in the applicant to one Soto, who would be integrated into management. Hodin, however, retained a controlling interest in the applicant. Thus, unlike the present case, the portion of *KIST* referred to by Chairman Marino involved the transfer of a *noncontrolling* interest, which raised less doubt about its validity than if an apparent transfer of control had occurred. Indeed, in another portion of *KIST*, the Commission rejected the purported gift of a controlling interest in another applicant as unworthy of credence. 102 FCC 2d at 292-93 ¶¶ 8-9, n.11.

[5] Two other recent cases concern the relative importance of the pre- and post-formation records in determining whether a proposal should be credited. *Webster-Fuller Communications Associates*, 5 FCC Rcd 4518 ¶ 3 (1990) states that a proposal would be credited based on the lack of post-formation participation by the applicant's passive owners. There is no indication, however, that the pre-formation record in that case raised questions similar to those here. In *Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5612 ¶¶ 14-21 (1990), the Commission found that the pre-formation record raised questions that, standing alone, could have justified rejecting the applicant's proposal. However, the Commission also found that the post-formation record confirmed the doubts raised by the pre-formation record, a circumstance not as clear here.

[6] It also bears noting that the pre-formation circumstances of this case are less favorable to the applicant than those in *Mulkey*. Thus, in *Mulkey*, the active principal negotiated her ownership share and gave a promissory note for a portion of her equity interest. 4 FCC Rcd at 5521 ¶ 6. Cooper, by contrast, merely accepted the partnership share offered him and made no investment in the applicant. The active principal in *Mulkey* also decided with local counsel that the applicant should be organized as a corporation (*id.* at 5521 ¶ 7), whereas Cooper played no role in the organization of Communications. Additionally, the record in *Mulkey* indicated that the passive investor there made his investment only after being satisfied with the active principal's qualifications. *Id.* at 5521 ¶ 8. Here, the limited partners signed the limited partnership agreement and made their initial capital contribution before a general partner had been recruited. These factors tend to make the ownership structure less credible than in *Mulkey*.

[7] Based on Cooper's uncertainty, the Board held that, but for the fact that Communications does not prevail in any event, the Board would have added issues regarding Communications' financial qualifications. 5 FCC Rcd at 3383 n.4.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-99

In re Applications of

WHITE STONE BROADCASTING COMPANY (hereafter "White Stone Broadcasting") File No. BPH-891018MJ

WINDMILL COMMUNICATIONS, A GENERAL PARTNERSHIP (hereafter "Windmill") File No. BPH-891018MK

For Construction Permit for a New FM Station on Channel 261A White Stone, Virginia

HEARING DESIGNATION ORDER

Adopted: March 28, 1991; Released: May 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

3. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

4. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

5. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

6. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-86

In re Applications of

WILLIAM F. PEEL, JR. (hereafter "Peel")	File No. BPH-890906MM
SAGE BROADCASTING CORPORATION OF FT. PIERCE, FLORIDA (hereafter "Sage")	File No. BPH-890912ME
CAPESTANY BROADCASTING, LIMITED PARTNERSHIP (hereafter "Capestany")	File No. BPH-890913ME
SAM IDAS (hereafter "Idas")	File No. BPH-890913MM
MYSTIC RADIO CORPORATION (hereafter "Mystic")	File No. BPH-890914MH
MINORITY BROADCASTING GROUP LIMITED (hereafter "MBGL")	File No. BPH-890914MT
KAREN M. LOWERY (hereafter "Lowery")	File No. BPH-890914MU
SEA OAKS BROADCASTING (hereafter "Sea Oaks")	File No. BPH-890914ND
CRYSTAL COMMUNICATIONS, INC. (hereafter "Crystal")	File No. BPH-890914NF
COASTAL BROADCASTING CORPORATION (hereafter "Coastal")	File No. BPH-890914NH
WHITE CITY RADIO PARTNERS (hereafter "Partners")	File No. BPH-890914NJ
WHITE CITY BROADCASTING, INC. (hereafter "WCBI")	File No. BPH-890914NP
Q PRIME INC. (hereafter "Prime")	File No. BPH-890914NV
HEATHER WILLSON CASS (hereafter "Cass")	File No. BPH-890914NW
JAMES H. HUMMEL (hereafter "Hummel")	File No. BPH-890914NY
MIDWAY BROADCASTING COMPANY (hereafter "Midway")	File No. BPH-890914OD
LUCILLE ANN LACY (hereafter "Lacy")	File No. BPH-890914OG

For Construction Permit
for a New FM Station on Channel 284A
in White City, Florida

HEARING DESIGNATION ORDER

Adopted: March 28, 1991; Released: May 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. A preliminary examination of these applications revealed that the Channel 284A allotment at White City, Florida, is the subject of a pending Petition for Reconsideration of the Report and Order in MM Docket 88-366.[2] Nonetheless, the applicants for the White City allotment will be allowed to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket 88-366.

3. Peel, Sage, Capestany, Idas, Mystic, Lowery, Sea Oaks, Crystal, Coastal, Partners, Prime, Cass, Hummel and Midway all propose to sidemount their antenna on an existing tower. All of the above-named applicants list the coordinates in Section V-B Item 2(b) as 27^0 26' 05" NL and 80^0 21' 42" WL. These coordinates correspond to the information on file with our Antenna Survey Branch. The Commission's Antenna Survey Branch lists the height of the supporting structure above ground (including antenna, and all other appurtenances, and lighting if any) as 159.7 meters and the top of supporting structure above mean sea level as 165.5 meters. In response to Section V-B, Items 7(a)(2) and (3), all of the above-named applicants' figures, except Midway, conflict with the values of 159.7 meters and 165.5 meters. Accordingly, the above-named applicants, with the exception of Midway, must file amendments clarifying the discrepancies with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, because of the discrepancies in the antenna height, an air hazard issue will be specified.

4. Section II, Item 3 of FCC Form 301 (June 1989) requires that an applicant, if not an individual, provide the date and place of the filing of its enabling charter. Partners has not answered Item 3. Accordingly, Partners must submit an amendment which gives all the information required by Section II, Item 3 to the presiding Administrative Law Judge within 30 days of the release of this Order.

5. Of the applicants who propose to sidemount their antenna on an existing tower listed at the coordinates 27^0 26' 05" NL and 80^0 21' 42" WL, Peel, Sage, Capestany, Idas, Sea Oaks, Coastal, Partners and Hummel have not sufficiently addressed the following issue. Our engineering study indicates that these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that the above-named applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Under 47 C.F.R. § 1.1307, an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the above-named applicants' proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of all nearby sources, including all AM, FM, and TV stations. In this regard, if the site is presently fenced in compliance with the guidelines, the above-named applicants' are required to so state and give the distance from the base of the tower to the fence. Accordingly, the above-named applicants will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. The comparative phase of the case will be allowed to begin before the environmental phase is completed. See *Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the above-named applicants' Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. See Section 1.1308(d) of the Commission's Rules.

6. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Capestany and Hummel have filed such statements, they are deficient. Neither Capestany nor Hummel have listed a women's organization. Accordingly, Capestany and Hummel will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

7. The applicants below have petitioned for leave to amend their applications after the last date for filing amendments as of right. The amendment filed by Capestany was accompanied by the good cause showing required by 47 C.F.R. § 73.3522 (a)(2); consequently the amendment is accepted for filing. The other amendments are accepted for filing under Section 1.65 of the Commission's Rules. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Peel	March 6, 1990
Sage	October 4, 1990
Capestany	April 17, 1990
Idas	July 16, 1990
Mystic	January 22, 1990; December 6, 1990 January 16, 1991; February 8, 1991 March 1, 1991
MBGL	June 7, 1990
Lowery	July 10, 1990; August 27, 1990 October 31, 1990; November 1, 1990
Crystal	August 21, 1990
WCBI	March 22, 1990; May 2, 1990 July 6, 1990; August 24, 1990
Prime	March 20, 1990; October 9, 1990
Lacy	January 22, 1990; September 4, 1990

8. Section II, Item 6 of FCC Form 301 (June 1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Sage has not completed Item 6 correctly. Sage's application gives a city and state as the residence address for each of its officers, directors and stockholders. Accordingly, Sage must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural ser-

vices in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Peel, Sage, Capestany, Idas, Mystic, Lowery, Sea Oaks, Crystal, Coastal, Partners, Prime, Cass and Hummel would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Peel, Sage, Capestany, Idas, Sea Oaks, Coastal, Partners or Hummel in which it is concluded that any of the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket 88-366.

13. IT IS FURTHER ORDERED, That Peel, Sage, Capestany, Idas, Mystic, Lowery, Sea Oaks, Crystal, Coastal, Partners, Prime, Cass and Hummel shall file clarifying amendments with respect to paragraph 3 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That Partners shall submit an amendment which contains the information required by Section II, Item 3 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

16. IT IS FURTHER ORDERED, That in accordance with paragraph 5 hereinabove, Peel, Sage, Capestany, Idas, Sea Oaks, Coastal, Partners and Hummel shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

17. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Capestany and Hummel shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Peel, Sage, Capestany, Idas, Mystic, MBGL, Lowery, Crystal, WCBI, Prime and Lacy ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That Sage shall submit an amendment which contains the information required by Section II, Item 6 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

20. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The application of White City Communications, Inc., BPH-890914NR, was returned as unacceptable for filing on May 8, 1990.

[2] 4 FCC Rcd 5295 (1989). The Petition for Reconsideration was filed on August 9, 1989, by Edens Broadcasting, Inc. (Edens), licensee of WRBQ, Tampa, Florida. A Petition for Reconsideration of the Commission's Memorandum Opinion and Order in MM Docket 85-304, 5 FCC Rcd 2576 (1990), upholding the denial of Edens' application to modify its facilities (BPH-830714AT) is also pending.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-98

In re Applications of

MARY ANNE EMBREY d/b/a CLARKSVILLE RADIO (hereafter "CR")	File No. BPH-890830MF
LISA M. JENKINS (hereafter "Jenkins")	File No. BPH-890905MA
IRVIN DAVIS (hereafter "Davis")	File No. BPH-890905MB
VALERIE HALE (hereafter "Hale")	File No. BPH-890905MC
KRB BROADCASTING, INC. (hereafter "KRB")	File No. BPH-890905MD
Q PRIME, INC. (hereafter "Prime")	File No. BPH-890905ME
MICHEAL R. LEEP (hereafter "Leep")	File No. BPH-890905MF
NELLIE GAINES (hereafter "Gaines")	File No. BPH-890905MN
KENTUCKIANA RADIO PARTNERS (hereafter "Kentuckiana")	File No. BPH-890905MO
ANTHONY D. FIELDS & DAVID B. SMITH d/b/a MINORITY VENTURE BROADCASTING (hereafter "Minority")	File No. BPH-890905MR
SANDRA METTS-SNOWDEN (hereafter "Snowden")	File No. BPH-890905MS
CLARKSVILLE BROADCASTING LTD. PARTNERSHIP (hereafter "CB")	File No. BPH-890905MU

For Construction Permit
for a New FM Station on
Channel 226A (93.1 MHz)
in Clarksville, Indiana

HEARING DESIGNATION ORDER

Adopted: March 28, 1991; Released: May 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *CR.* On January 18, 1991, Gaines filed an informal objection to the application of CR. In her objection, Gaines states that, under the Commission's "hard look" policy, the application should be dismissed in accordance with 47 C.F.R. § 73.3566. Specifically, Gaines states that on January 29, 1990, CR filed an amendment to increase its ERP/HAAT combination from 3.0 kW/100 meters to 3.2 kW/93 meters. Such an amendment, Gaines implies, would render the application in violation of 47 C.F.R. § 73.211, as the applicant would be proposing parameters in excess of those allowed a Class A facility.

3. Firstly, Gaines' reliance on the Commission's "hard look" policy is misplaced, as amendments are not subject to this policy. *See Taber Broadcasting Company of New Mexico*, 4 FCC Rcd. 7892 (1989). More importantly, CR's timely filed amendment indicates that it was filed pursuant to the rules adopted in the *Second Report and Order* in Docket 88-375, 54 Fed. Reg. 35335 (August 25, 1989). The rules adopted therein increased the maximum effective radiated power (ERP) for commercial Class A stations to 6 kilowatts and revised the table of minimum distance separations involving Class A stations accordingly. (Table A, Section 73.207).

4. A *Public Notice* released on November 3, 1989, Mimeo No. 451 contained a list of newly grandfathered Class A stations that became short spaced on October 2, 1989 as a result of the new minimum distance separation requirements, and thus fall under the new grandfather provisions of Section 73.213. CR's amendment indicates that CR requested processing pursuant to 47 C.F.R. § 73.213 of the Commission's new spacing rules. The November 3, 1989 *Public Notice* further states that newly grandfathered Class A stations with an HAAT less than 100 meters may increase their ERP on or after December 1, 1989, provided that the predicted distance to their F(50,10) 34 dBu contour does not exceed 98 kilometers. Consequently, CR's proposed ERP/HAAT combination of 3.2 kW/93 meters, as amended, produces a F(50,10) 34 dBu contour which extends only 98 kilometers - the equivalent of a 3 kW/100 meter Class A station. Therefore, CR's amended application complies with the newly revised Section 73.213. Accordingly, Gaines objection will be denied.[1]

5. *KRB and Minority.* On January 18, 1981, Gaines also filed informal objections to the January 8, 1990 and June 1 1990 amendments submitted, respectively, by KRB and Minority. KRB and Minority each filed an amendment to increase their ERP/HAAT combination from 3.0 kW/100 meters to 3.9 kW/124 meters. Gaines contends that the KRB and Minority applications, as amended, violate the Commission's "hard look" policy and should be dis-

missed. In response, Minority argues that the *Second Report and Order* in MM Docket No. 88-375, *supra*, permits Class A FM stations to increase their ERP up to a maximum of 6.0 kW in certain circumstances. Minority argues that Gaines' objection fails to demonstrate in what respect Minority's amended application violates the Commission's "hard look" policy.

6. We agree with Minority's arguments. The *Second Report and Order* in MM Docket 88-375, *supra*, permits Class A FM stations to increase power to a maximum of 6.0 kW/100 meters. Since KRB's and Minority's timely filed amendments were filed after the effective date of this *Second Report and Order*, [October 2, 1989] the amendments were accepted for filing. Furthermore, as stated in paragraph 3 hereinabove, amendments are not subject to the Commission's "hard look" policy. Accordingly, for the reasons noted herein, Gaines' informal objections will be denied.

7. *Gaines*. Gaines' application, as amended on January 6, 1990, does not demonstrate compliance with 47 C.F.R. Section 73.315. Applicants for FM broadcast stations are required to submit a map or maps which clearly and legibly show the proposed 60 and 70 dBu contours and the legal boundaries of the community of license. The contour map submitted in the Gaines amendment does not show the 70 dBu contour and the entire legal boundaries of the community of license as required. By means of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), paragraph 23 and Appendix D, paragraph 4(g), the Commission established the presence of such a map as one element of tenderability or substantial completeness at the time of filing. The absence of such a map would subject the application to dismissal. However, the tenderability component of the "hard look" standard does not apply to amendments. *See, Taber Broadcasting Company, supra*. Accordingly, Gaines will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days after this Order is released.

8. *Snowden*. Snowden filed an amendment to its application on January 8, 1990. The amendment is defective in that the contour map submitted does not clearly and legibly show the proposed 70 dbu contour and the legal boundaries of the community of license. Moreover, the topographic site map provided in the amendment does not contain the original U.S.G.S. reference coordinates as required. Consequently, although Snowden's amendment contains two tenderability defects, *see Report and Order*, above, paragraph 23 and paragraphs 4(b) and (g) of Appendix D, such amendments are not subject to the "hard look" standard. Therefore, Snowden will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days after this Order is released.

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That Gaines' informal objections ARE HEREBY DENIED.

13. IT IS FURTHER ORDERED, That Gaines shall submit a corrective amendment as required by paragraph 7, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

14. IT IS FURTHER ORDERED, That Snowden shall submit a corrective amendment as required by paragraph 8, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

15. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] It should be noted that due to the amendment of right period opened via the January 30, 1991 Notice of Tender with the reinstatement of applicant Jenkins, various amendments filed by the competing Clarksville applicants, which otherwise would have been late-filed, will be considered filed as of right and therefore, will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideraton in MM Docket No. 84-750, 50 Fed. Reg. 43157 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-100

In re Applications of

MADALINA BROADCASTING, INC. (hereafter "Madalina")	File No. BPH-890921MB
BONNIE P. FOX (hereafter "Fox")	File No. BPH-890921MC
SCOTTLITE, INC. (hereafter "Scottlite")	File No. BPH-890921ME
Q PRIME INC. (hereafter "Q Prime")	File No. BPH-890921MF
LIN-MAR BROADCASTING, INC. (hereafter "Lin-Mar")	File No. BPH-890921MG
MARY GAINES (hereafter "Gaines")	File No. BPH-890921MH
CYNTHIA DEVANEY (hereafter "Devaney")	File No. BPH-890921MI
FORT WORTH RADIO, INCORPORATED (hereafter "Fort Worth")	File No. BPH-890921MJ
TEXAS COMMUNICATIONS, INC. (hereafter "TCI")	File No. BPH-890921MK
PODER BROADCASTING, INC. (hereafter "Poder")	File No. BPH-890921ML
PRAIRIE BROADCASTING, INC. (hereafter "PBI")	File No. BPH-890921MN
HALTOM CITY RADIO PARTNERS (hereafter "HCRP")	File No. BPH-890921MO
THE RADIO VOICE OF HALTOM CITY, INC. (hereafter "Voice")	File No. BPH-890921MQ
JONATHAN AND MARY LYN WOLFERT, A GENERAL PARTNERSHIP (hereafter "Wolfert")	File No. BPH-890921MR
HISPANIC COALITION, INC. (hereafter "HCI")	File No. BPH-890921MS
MICHAEL C. NELMS (hereafter "Nelms")	File No. BPH-890921MT
THE ANCHOR NETWORK LIMITED PARTNERSHIP (hereafter "Anchor")	File No. BPH-890921MX
LENOX BROADCASTING CORPORATION (hereafter "Lenox")	File No. BPH-890921MY
O'DAY BROADCASTING, LTD. (hereafter "O'Day")	File No. BPH-890921MZ
R.W. Andrews, Urban J. Endres, Billy Wayne Hooten, Charles R. Bowers d/b/a HALTOM MEDIA SERVICES (hereafter "HMS")	File No. BPH-890912NB
JOHN W. BARGER (hereafter "Barger")	File No. BPH-890921NC
MELANIE BRUTON (hereafter "Bruton")	File No. BPH-890921NG
CHARLES B. JOHNSON (hereafter "Johnson")	File No. BPH-890921NH
METROPLEX SPANISH BROADCASTERS, INC. (hereafter "Metroplex")	File No. BPH-890921NI
TARRANT COUNTY EDUCATIONAL FOUNDATION (hereafter "Tarrant")	File No. BPED-890921MA [Dismissed herein]

AMERICAN INDIAN BROADCAST GROUP, INC. (hereafter "American Indian")

File No. BPH-890921NA [Dismissed herein]

For Construction Permit for a New FM Station on Channel 227C2 (93.3 MHz) in Haltom City, Texas

HEARING DESIGNATION ORDER

Adopted: March 28, 1991; Released: May 9, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matters.* An examination of the applications filed by Madalina, Scottlite, Q Prime, Lin-Mar, TCI, HCRP, Nelms, Lenox, Barger and Bruton indicates they are short spaced to pending Rule Making 7147. In the *Notice of Proposed Rule Making* in MM Docket 90-85, 5 FCC Rcd 1263 (1990) ("NPRM"), the Commission, at the request of First Greenville Corporation, licensee of KIKT (FM), proposed the substitution of Channel 228C2 for Channel 228A at Greenville, Texas. Additionally, KIKT(FM) seeks the modification of its facilities to specify operation on the higher powered channel. The Commission noted in the NPRM that KIKT(FM)'s proposal would be short spaced to several pending applications for Channel 227C2 at Haltom City, Texas. However, the NPRM states that if the proposed rulemaking is adopted, the Haltom City applicants will be permitted to amend their applications to specify a site in conformance with the spacing requirements and retain cut-off protection. Therefore, while the applicants will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded to any one of the aforementioned applicants as a result of this proceeding shall be made contingent on the outcome of MM Docket 90-85.

3. *Tarrant.* An engineering study of Tarrant's application reveals that it is in violation of 47 C.F.R. § 73.207. Its proposal is short spaced by 6.6 km to a construction permit (BPH-870302MR) filed by Station KTYL-FM, Tyler, Texas. The required separation distance is 188 km and the actual distance is 181.4 km. Additionally, Tarrant's proposal is short spaced by 5.1 km to the Tyler, Texas allotment. This short spacing was not addressed in the application, nor was there a request for waiver of the spacing requirements of Section 73.207. Accordingly, Tarrant's application will be dismissed as inadvertently accepted for filing.

4. *American Indian.* An engineering review of American Indian's proposal indicates that it is short spaced by 14.4 km to the licensed facilities of Station KBTS-FM, Killeen, Texas. American Indian has requested a waiver of 47 C.F.R. § 73.207.

5. When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644 (D.C. Cir. 1968). The applicant states that its site was selected due to "difficulty finding a fully spaced site because of the close proximity of the Dallas-Ft. Worth International Airport." Commission policy does not permit waiver of the minimum distance separation requirements unless no fully-spaced or less short-spaced sites exist. *See Donovan Burke*, 104 FCC 2d 843 (1986); *Megamedia*, 67 FCC 2d 1527 (1978). In this proceeding, 24 out of the 26 applicants (with the exception of the applicants who are short spaced to the Greenville, Texas proposal discussed above) specified fully-spaced sites. Moreover, American Indian has raised no question about the availability or technical feasibility of these sites. Therefore, it would be difficult to grant American Indian's waiver in the public interest when other applicants propose to provide the same service to Haltom City without violating any Commission rule. Accordingly, American Indian's request for waiver of Section 73.207 will be denied and its application dismissed as inadvertently accepted for filing.

6. *Devaney and PBI.* Devaney's and PBI's applications were originally filed on September 21, 1989. Devaney and PBI amended their applications on January 16, 1990 and June 22, 1990, respectively, to specify new transmitter sites.

7. In the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985), *recon. denied, Memorandum Opinion and Order*, 50 Fed. Reg. 43157 (1985), the Commission adopted strict rules governing acceptance of amendments to applications for FM facilities. These rules provide that amendments which address the acceptability or grantability of an application may be filed as a matter of right any time prior to the expiration of the 30-day period triggered by the release of the Public Notice announcing that the subject application had been accepted for tender. 50 Fed. Reg. at 19941; *see also* 47 C.F.R. § 73.3522(a)(6). Once this period expires, predesignation amendments "will be considered only upon a showing of good cause for late filing or pursuant to § 1.65 or § 73.3514" of our rules. 47 C.F.R.§ 73.3522(a)(6).

8. The 30-day period for filing amendments, as a matter of right, in the instant proceeding began on December 8, 1989 and ended on January 8, 1990. The January 16, 1990 and June 22, 1990 amendments were filed after this period. Additionally, Devaney and PBI did not make the required showing to establish good cause for the acceptance of their amendments. Accordingly, the amendments will be returned as untimely filed. Since no determination has been received from the FAA as to whether the parameters specified in the original applications would constitute a hazard to air navigation, appropriate air hazard issues will be specified.

9. *Madalina, Scottlite, Fort Worth, Poder, HCRP, HCI and Metroplex.* Section III, Item 3 (Financial Qualifications) of FCC Form 301 (1989) requires the applicant to identify each source of funds, including the name, address and telephone number of the source and a contact person if the source is an entity. Madalina, Scottlite, Fort Worth, Poder, HCRP, HCI and Metroplex either list a bank(s) or other entities as the primary source of funding. However, these applicants did not provide the name of a contact person for these entities as required by Section III. Accordingly, they will be required to provide to the presiding Administrative Law Judge within 30 days of the release of this Order an amendment which corrects this omission.

10. *Q Prime and Anchor.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Q Prime and Anchor have filed such statements, they are deficient. Q Prime has not listed specific sources of recruitment specializing in women candidates. Anchor has failed to identify specific school(s) or other beneficiaries it will utilize in its proposed training program for minorities and women interested in entering the broadcast field. Accordingly, Q Prime and Anchor will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

11. *Poder and Anchor.* Section II, Item 1 of FCC Form 301 (1989) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Poder and Anchor have not completed Item 1 correctly. Poder's and Anchor's applications fail to list the required specific information about the applicant itself as requested in Item 1. Accordingly, Poder must submit an amendment which gives all the information required by Section II, Item 1 to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. *PBI.* Applicants for new broadcast stations are required by 47 C.F.R. § 73.3580 to give local notice of the filing of their applications. PBI has published the required notice, but the notice is deficient in that it fails to provide the proposed location of its main studio. To remedy this deficiency, PBI must republish an amended local notice of the application, if it has not already done so, and so inform the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

13. *Wolfert.* By amendment filed January 8, 1990, Wolfert changed the legal structure of the applicant from an "individual" applicant to a "general partnership." As a result of this change, Wolfert is now required to respond to Section II, Item 3, FCC Form 301 (1989) which asks for information regarding the applicant's enabling charter if the applicant is not an "individual" applicant. Accordingly, Wolfert will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which gives all the information required by Section II, Item 3.

14. *HCI.* HCI amended its application on January 8, 1990. Among the changes made, HCI added Dalia Boatright as a "20% party to the application." The amendment indicated that Boatright is presently employed as national sales manager at Radio Station KFSA(AM) in Dallas, Texas. However, Commission records indicate that those call letters are assigned to a station in Fort Smith, Arkansas, not Dallas, Texas. Additionally, this information is required to determine if there is a possible violation of the Commission's cross-interest policy. Accordingly, HCI will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which gives the correct call letters of the radio station in Dallas where Boatright is employed.

15. *Anchor.* Anchor's application, as originally filed, indicated that its legal name was "JLG Enterprises, Limited Partnership." On March 28, 1990 the applicant amended its application. The amendment was signed by the general partner, Phyllis Watson Gilliard, on behalf of "The Anchor Network Limited Partnership." In addition, attached to the amendment was a copy of the Certificate of Limited Partnership for the Anchor Network Limited Partnership. To date, Commission records indicate that Anchor has not filed an amendment providing notification that the applicant has changed its legal name.

16. Under 47 C.F.R. § 1.65 each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Moreover, whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall, as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Accordingly, Anchor will be required to file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment formally changing the name of the applicant and a new Organizational Table detailing the new limited partnership as required by Section II, Item 6.

17. *O'Day.* In response to Section II, Item 6 (Organizational Chart) of FCC Form 301 (1989), O'Day indicates it is a limited partnership and lists one general partner, Anna O'Day, who has 100% voting control and 15% equity in the applicant. However, Exhibit 1 of the application indicates that there are two additional general partners, Joan Leanos and Craig L. Siebert, who were not listed in Section II. In addition, Item 6 asks the applicant to list the applicant, parties to the application and nonparty equity owners in the applicant. O'Day did not list the limited partners who possess the remaining 85% equity in the applicant. Accordingly, O'Day will be required to explain the relationship of Leanos and Siebert to the applicant and provide to the presiding Administrative Law Judge within 30 days of the release of this Order an amended Organizational Table, which details the complete organizational structure of the applicant. *See, Report and Order* in Docket 88-328, 4 FCC Rcd 3853 (1989).

18. *Johnson.* Johnson is the general partner in Johnson Television, Ltd., an applicant for a construction permit for a new television station at Arlington, Texas (BPCT-850422KG). This application was dismissed pursuant to an *Initial Decision*, in MM Docket No 85-234, released on May 15, 1989. This *Initial Decision* is presently the subject of exceptions pending before the Review Board. Therefore, if Johnson's application for Arlington is granted, he would be in violation of the Commission's one-to-a market rule, which prohibits the direct or indirect ownership, operation or control of both an FM station and a television station if the FM's 3.16 mV/m contour encompasses the entire community of license of the television station or if the television's Grade A contour encompasses the entire community of license of the FM station. Johnson has indicated he will divest himself of his interest in the Arlington application if the instant application is granted. Accordingly, an appropriate condition will be specified below.

19. The applicants below have petitioned for leave to amend their applications after the last day for filing amendments as of right. The amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE(S) FILED
Madalina	March 13, 1990
Scottlite	May 4, 1990
Q Prime	April 5, 1990
Gaines	October 1, 1990
Fort Worth	August 28, 1990
TCI	July 25, 1990
HCRP	March 20, 1990, July 11, 1990
Wolfert	September 27, 1990
Barger	September 7, 1990
Bruton	October 19, 1990, January, 22, 1991
Metroplex	December 21, 1990

20. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE(S) FILED
Scottlite	March 9, 1990, April 5, 1990, April 6, 1990, June 5, 1990
Q Prime	January, 10, 1990, March 20, 1990, October 9, 1990
Lin-Mar	June 19, 1990, July 13, 1990 (Engineering)
Gaines	February 14, 1990, May 31, 1990, June 15, 1990, October 1, 1990
Fort Worth	November 19, 1990
HCRP	January 9, 1990, July 11, 1990
Anchor	March 28, 1990
Lenox	January 22, 1990, December 6, 1990, January 16, 1991, February 8, 1991, March 1, 1991
O'Day	January 10, 1990, August 24, 1990, September 5, 1990
Barger	December 17, 1990
Bruton	January 10, 1990, March 22, 1990 May 8, 1990, August 20, 1990

21. The Federal Aviation Administration has determined that the antenna proposed by TCI would constitute a hazard to air navigation. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

22. Since no determination has been received from the Federal Aviation Administration as to whether the antennas proposed by Fox, Anchor, HMS, Barger, Bruton and Johnson would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

23. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

24. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

25. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Fox, Devaney, TCI, PBI, Anchor, HMS, Barger, Bruton and Johnson would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

26. IT IS FURTHER ORDERED, That a grant of any one of the following applications in this proceeding shall be contingent on the outcome of MM Docket 90-85: Madalina, Scottlite, Q Prime, Lin-Mar, TCI, HCRP, Nelms, Lenox, Barger and Bruton.

27. IT IS FURTHER ORDERED, That American Indian's request for waiver of § 73. 207 IS DENIED and the applications of Tarrant and American Indian ARE DISMISSED as inadvertently accepted for filing.

28. IT IS FURTHER ORDERED, That the amendments filed by Devaney and PBI on January 16, 1990 and June 22, 1990, respectively, ARE HEREBY RETURNED as untimely filed.

29. IT IS FURTHER ORDERED, That Madalina, Scottlite, Forth Worth, Poder, HCRP, HCI, and Metroplex shall submit an amendment in accordance with paragraph 9 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

30. IT IS FURTHER ORDERED, That within 30 days of the release of this Order Q Prime and Anchor shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

31. IT IS FURTHER ORDERED, That Poder and Anchor shall submit an amendment which contains the information required by Section II, Item 1 of FCC Form 301 (1989), to the presiding Administrative Law Judge within 30 days of the release of this Order.

32. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, PBI shall inform the presiding Administrative Law Judge as to whether a corrected local notice of the filing of its application has been republished.

33. IT IS FURTHER ORDERED, That Wolfert shall submit an amendment in accordance with paragraph 13 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

34. IT IS FURTHER ORDERED, That HCI shall submit the amendment indicated in paragraph 14 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

35. IT IS FURTHER ORDERED, That Anchor shall submit an amendment in accordance with paragraph 16 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

36. IT IS FURTHER ORDERED, That O'Day shall submit an amendment in accordance with paragraph 17, hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

37. IT IS FURTHER ORDERED That in the event of a grant of Johnson's application, the construction permit shall be conditioned as follows:

> Prior to the commencement of program test authorization, the permittee shall certify to the Commission that Charles B. Johnson has divested his interest in Johnson Television, Ltd., an applicant for a new television station at Arlington, Texas (BPCT-850422KG).

38. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Madalina, Scottlite, Q Prime, Lin-Mar, Gaines, Fort Worth, TCI, HCRP, Wolfert, Anchor, Lenox, O'Day, Barger, Bruton and Metroplex ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

39. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

40. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

41. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

42. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Knight Communications, Corp. (BPH-890920ME) and Haltom City FM Broadcasters Limited Partnership (BPH-890921MU) requested dismissal of their applications. The requests were voluntary and in accordance with our requirements governing such matters. Accordingly, the applications were dismissed by Commission letters dated March 1, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-401

In re Applications of

OLIVER KELLEY AND MARY ANN KELLEY, Joint Tenants with the Right of Survivorship	File No. BPH-870821MB
VAL-JO COMMUNICATIONS, INC.	File No. BPH-870827MD
MARTHA JEAN SULLIVAN	File No. BPH-870827MM
CAPRICORN BROADCASTING COMPANY, INC.	File No. BPH-870827NK

For Construction Permit for a
New FM Station on Channel 297A
Nolanville, Texas

Appearances

Harry C. Martin on behalf of Oliver Kelley and Mary Ann Kelley, Joint Tenants with the Right of Survivorship; *Herbert D. Miller, Jr.* on behalf of Val-Jo Communications, Inc.; *Stephen Diaz Gavin* on behalf of Martha Jean Sullivan; *William E. Kennard* on behalf of Capricorn Broadcasting Company, Inc.; and *Jerry Hermele* on behalf of the Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: April 29, 1991; Released: May 10, 1991

1. This proceeding involves the mutually exclusive applications of Oliver Kelley and Mary Ann Kelley, Joint Tenants with the Right of Survivorship (Kelleys); Val-Jo Communications, Inc. (Val-Jo); Martha Jean Sullivan (Sullivan) and Capricorn Broadcasting Company, Inc. (Capricorn) for a construction permit for a new FM station on Channel 297A (107.3 MHz) in Nolanville, Texas.[1]

2. By *Hearing Designation Order*, DA 88-1221, released on September 8, 1988, the Commission designated the applications referenced above for comparative hearing on the following issues:

> 1. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

3. The *Hearing Designation Order* also specified that the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, would be considered under the standard comparative issue.

4. Hearing sessions on the designated issues began on August 22, 1989, and the Presiding Judge closed the record at the conclusion of the last session on August 24, 1989.

5. By *Memorandum Opinion and Order*, FCC 89M-2577, released on November 2, 1989, the Presiding Judge subsequently reopened the record and designated the following issue:

> To determine whether Colonel Oliver Kelley, a party to the application of Oliver Kelley and Mary Ann Kelley, Joint Tenants with the Right of Survivorship, misrepresented material facts and/or was less than candid in his testimony concerning his lack of contemporaneous awareness of the Statement of Proposed Integration and Diversification filed in the Olney, Texas FM proceeding on April 4, 1988 and, if so, the effect on the qualifications of Oliver Kelley and Mary Ann Kelley, Joint Tenants with the Right of Survivorship, to become a Commission licensee.

6. A further hearing session began on February 6, 1990, and the Presiding Judge closed the record on February 7, 1990. Proposed Findings of Fact and Conclusions of Law were filed on April 23, 1990 and Replies on May 18, 1990.

Misrepresentation/Lack of Candor Issue Designated Against Oliver Kelley and Mary Ann Kelley, Joint Tenants with Right of Survivorship

7. Colonel Kelley, along with Vernon Beck, were equal partners in an application for a broadcast license for Olney, Texas filed by the Olney Broadcasting Company (Olney) (Kelley, Ex. #8) in MM Docket No. 87-575 (Val-Jo, Ex. #12). At the time they organized the applicant, Colonel Kelley and Mr. Beck were both living in Wichita Falls, Texas, approximately 40 miles from Olney, Texas (Kelley, Ex. #8, p. 1). The partners agreed among themselves that Colonel Kelley and not Mr. Beck would serve as General Manager of the station (Kelley, Ex. #8, p. 1). Mr. Beck testified that he had just sold a broadcast station and at the time did not want the responsibilities of General Manager (Kelley, Ex. #9, p. 1). According to Colonel Kelley, there was no further discussion of their intended roles at the Olney station after the Olney application was filed (Tr. 118; Tr. 885). Mr. Beck affirmed this testimony (Kelley, Ex. #9, p. 2). On April 4, 1988, an integration statement was submitted in the Olney, Texas proceeding which identified Colonel Kelley as the proposed station's Assistant Manager and Vernon Beck as the proposed General Manager. The statement, which was signed only by Vernon Beck, also mentioned that Colonel Kelley had an application pending for a broadcast facility

in Harker Heights, Texas (Val-Jo, Ex. #12, p. 3). The Olney application was subsequently dismissed in October 1988 pursuant to an *Order* approving a joint settlement agreement (Tr. 111).

8. A misrepresentation/lack of candor issue was designated against the Kelleys based on certain statements made by Colonel Kelley during the course of the initial hearing session, the above referenced integration statement which appeared to call into question the legitimacy of Colonel Kelleys' full-time integration proposal in this proceeding, the Kelleys' answer to a certain written interrogatory, and, finally, an amendment dated February 17, 1988 submitted by Olney in the Olney, Texas proceeding.

9. Colonel Kelley testified with little or no certainty, during the course of the initial hearing session, that he had personally typed substantial portions of the Olney application using his own typewriter, and he went on to identify specific parts of that document which he had personally typed (Tr. 214-215). It is undisputed that the Olney integration proposal referenced above which commits Colonel Kelley to an active role at the Olney station and Olney's application were typed on the same typewriter. His proposal to be integrated into the management of the Olney station is seemingly confirmed by an answer to an interrogatory filed in this proceeding on May 3, 1989 in which Colonel Kelley stated that he was proposed to be integrated for a minimum of 40 hours a week as General Manager at the Olney, Texas station (Tr. 865-866). At the hearing, however, he indicated that he was surprised to learn, just shortly before his testimony in this proceeding, that he had been proposed for integration in any capacity in the Olney proceeding (Tr. 863). He added that after the filing of the Kelleys' Nolanville application in 1987, he had assumed that the Olney file reflected that he no longer intended to work at the Olney station (Tr. 883), although he admitted that he did not tell Mr. Beck about his change in plans (Tr. 885), and he was unable to pinpoint the specific time when he decided not to participate on a day-to-day basis at the Olney station (Tr. 120). He testified, rather, that it was a gradual decision which developed over a period of time and occurred after the opportunity for filing for the Nolanville, Texas facility presented itself (Tr. 120). The February 17, 1988 Olney amendment referenced above reports the filing of the Kelleys' Nolanville, Texas application. Colonel Kelley originally testified that he had typed the amendment, signed it and used Wichita Falls, Texas as his address because he happened to be in the law office he maintained in his home in Wichita Falls, Texas at the time he signed the amendment (Tr. 112, 137, 217). Colonel Kelley's role in preparing and signing the amendment appears to contradict his claim that he had little or no involvement in the Olney application after it was filed.

10. Colonel Kelley subsequently corrected his earlier testimony and stated that he did not type the Olney application. After conferring with Mr. Beck and reviewing certain materials in his files, he remembered that he prepared a draft of portions of the Olney application, but that Mr. Beck actually typed the final copy as well as Olney's integration statement; and that he, Colonel Kelley, saw the Olney integration statement for the first time less than a month before the further hearing session in this proceeding (Tr. 115). He also changed his testimony with respect to the February 17, 1988 Olney amendment, indicating that his prior testimony as to who drafted the amendment and where it was prepared was based on pure speculation; and that he could not explain the use of the Wichita Falls, Texas address (Tr. 912).

11. Colonel Kelley testified that he informed counsel in the Olney proceeding, during the Summer of 1987, of his pledge in the Nolanville, Texas proceeding to divest Olney and that counsel assured him that it had been reported to the Commission; and that he also mentioned to counsel that as soon as he had an address in Harker Heights, Texas, he would call him and give him that information which, Colonel Kelley said, he subsequently did (Tr. 200-02); and that counsel assured him that an amendment reporting his move would be filed. Colonel Kelley's divestiture commitment and move to Harker Heights, Texas were not reported in the Olney, Texas proceeding (Val-Jo/Capricorn Requests for Admissions received into evidence on February 6, 1990).

12. Mr. Beck testified that in preparing Olney's integration statement he unilaterally decided to change Colonel Kelley's position at the station from General Manager to Assistant Manager in the belief that Colonel Kelley's move to Harker Heights, Texas made it impractical for Colonel Kelley to serve as the station's General Manager. He decided to assume this position because his close proximity to Olney, Texas made it easier for him to make the day-to-day decisions necessary to run the station (Kelley, Ex. #9, p. 2; Tr. 1018-19); whereas Colonel Kelley could handle his duties as Assistant Manager from a location outside the area. Mr. Beck was unsure as to where he got the information about Colonel Kelley's move to Harker Heights, Texas (Tr. 1056) or the filing of the Kelleys' Nolanville, Texas application. However, he believes that he got the information about the move to Harker Heights from Olney's counsel (Tr. 1016) and the filing of the Nolanville application from either Olney counsel, an industry periodical, or from Colonel Kelley himself (Tr. 1015). He reaffirmed his testimony that he never spoke to Colonel Kelley about the integration statement (Tr. 1015), and he doubts that he ever sent Colonel Kelley a copy of Olney's integration proposal (Tr. 1037). Mr. Beck went on to state that his usual practice with respect to documents filed in the Olney, Texas proceeding was to send the document to communications counsel and when returned to him, mail a copy to Colonel Kelley (Tr. 1037). He was unable to recall whether or not he received a copy of the integration statement from counsel after it had been filed in the Olney, Texas proceeding (Tr. 1037), adding that he did not attach much significance to the statement, remembering only that it had to be prepared quickly (Tr. 1016). He agreed that the statement contained therein that Colonel Kelley would work 40 hours a week at the station was a mistake (Tr. 1029).

13. The evidence of record supports Kelleys' claim that Mr. Beck was the moving force behind the Olney, Texas application at and after its filing, and that Colonel Kelley's role was very limited and consisted only of drafting portions of the application as well as the February 7, 1988 amendment to the Olney application which reflected a matter of direct concern to him, namely the filing of the Nolanville, Texas application. Although Colonel Kelley believed initially that he had prepared Olney's application, he remembered after reviewing a draft of that document bearing his name in Mr. Beck's handwriting and Mr. Beck's added notation that it had been mailed to Olney counsel, combined with Mr. Beck's recollection of events surrounding the filing of the Olney, Texas, applica-

tion, that he had not prepared the final copy of Olney's application (Kelley, Ex. #9, Attachment A, p. 1; Tr. 903-05; Tr. 964; Kelley, Ex. #9, p. 1). The apparent inconsistency between Colonel Kelley's earlier and later testimony as to who prepared the final draft of Olney's application has been satisfactory explained, and the identity of the author of the integration statement has been identified. Mr. Beck admitted to preparing both documents, and he has assumed full responsibility for the misrepresentation contained in Olney's integration proposal with respect to Colonel Kelley's participation in the management of the Olney, Texas station. His testimony containing the admission that he did not discuss the integration statement with Colonel Kelley before it was drafted has not been successfully challenged. Furthermore, the contents of the statement support Mr. Beck's contention that he had no knowledge of the document or its contents. It is noted that the statement refers to the Harker Heights, Texas application, an obvious error which would not have occurred if Colonel Kelley had prepared the statement or assisted in its drafting. Colonel Kelley's answer to interrogatories that he was proposed to be integrated as General Manager in the Olney proceeding is entirely consistent with his and Mr. Beck's intentions at the time the Olney application was filed, but clearly inconsistent with the integration statement which lists his position as Assistant Manager, lending further weight to the Kelleys' contention that Colonel Kelley had no role in the preparation of the Olney integration statement.

14. The Presiding Judge concludes, therefore, that the inconsistencies in Colonel Kelley's testimony and between official documents filed in two separate proceedings before this Commission have been properly explained and do not reflect that Colonel Kelley, who the Presiding Judge found to be a credible witness, deliberately sought to mislead this Commission or that he lacked candor in dealing with the Commission. Colonel Kelley can, perhaps, be faulted for not paying sufficient attention to the Olney proceeding: a fact which can be explained by his move to Harker Height, Texas and a shift in interest to the Nolanville, Texas proceeding. However, based on the evidence of record in this proceeding, there is no indication that he deliberately sought to mislead this Commission or conceal information from it. Finally, as to the Olney amendment filed on February 17, 1988 which lists Wichita Falls, Texas as the return address, as the Kelleys point out, Colonel Kelley lacked any motive to misrepresent his domicile in the Olney, Texas proceeding, since Wichita Falls, Texas is outside the proposed service area of the Olney station and his residence within that community would confer no comparative benefit on the applicant, Olney (Tr. 921). Therefore, Colonel Kelley's testimony that he continued to maintain an office in Wichita Falls, Texas properly explains the use of that address. Accordingly, the Presiding Judge finds, based on the evidence of record, that Colonel Kelley did not engage in any misrepresentations and did not lack candor with this Commission, and the misrepresentation/lack of candor issue designated against the Kelleys will be resolved in the Kelleys' favor.

OLIVER KELLEY AND MARY ANN KELLEY, JOINT TENANTS WITH THE RIGHT OF SURVIVORSHIP

Findings of Fact

15. If their application is granted, Oliver Kelley and Mary Ann Kelley have agreed to own their proposed Nolanville, Texas radio station as Joint Tenants with a Right of Survivorship (Kelley, Ex. #1).

Diversification

16. Neither Colonel Kelley nor Mrs. Kelley has any interests or associations with any medium of mass communications (Kelley, Ex. #2, p. 4; Kelley, Ex. #3, p. 4).

Best Practicable Service

Oliver Kelley

17. Colonel Kelley proposes to serve as General Manager of the proposed station on a full-time basis or forty (40) or more hours a week. In this capacity, he will have responsibility for all of the station's operations, including programming, public relations, personnel management and the station's technical operations (Kelley, Ex. #2, p. 1).

18. Colonel Kelley claims that he first resided within the service area of the proposed Nolanville station in July 1973 as a result of a military order transferring him to Fort Hood, Texas (Kelley, Ex. #2, p. 1). Colonel Kelley was transferred out of Fort Hood in 1975, and then reassigned to Fort Hood in June 1982, remaining there until July 31, 1986 (Kelley, Ex. #2, p. 1-2). During these two assignments to Fort Hood, Colonel Kelley spent four and one-half years living in Harker Heights, Texas, and one and one-half years at Fort Hood, Texas. Both Harker Heights and Fort Hood are located within the 1 mV/m contour of the proposed station. Colonel Kelley claims that he returned to Harker Heights on October 24, 1987, and has resided there continuously since then. Colonel Kelley has been involved in activities associated with St. Christopher's Episcopal Church, Killeen, Texas from 1973 to 1975 and from 1989 to the present, and the Bell County Republican Party from 1988 to the present. In addition, he was a member of the Quarterback Club, Killeen, Texas between 1985 and 1986 and a member of Greater Killeen Chamber of Commerce, Killeen, Texas from 1987 to the present. These activities took place within the 1 mV/m contour of the Kelleys proposed station (Kelley, Ex. #2, pp. 4, 6).

19. Colonel Kelley's broadcast experience occurred between September 1954 and 1959 at station KTRN, Wichita Falls, Texas where he performed a wide variety of tasks, including production work, acting as music librarian, and as a news broadcaster (Kelley, Ex. #2, p. 4).

Mary Ann Kelley

20. Mrs. Kelley will serve on a full-time basis, at least forty (40) or more hours a week, as Business Manager of the proposed station. In that capacity, she will be in charge of sales, financial planning, budgeting, billing, and collections. She will also supervise the sales manager and all clerical personnel (Kelley, Ex. #3, p. 1).

21. Mrs. Kelley's claim for residence within the 1 mV/m contour of their proposed station mirrors that of her husband (Kelley, Ex. #3, pp. 1-2). She also has been also involved in activities sponsored by St. Christopher's Episcopal Church, Killeen, Texas from 1973 to 1975, from 1982 to 1986, and from 1987 to the present, and with the Bell County Republican Party from 1987 to the present. In addition, Mrs. Kelley was a member of the Quarterback Club, Killeen High School, Killeen, Texas between 1985 and 1986, and served as Room Mother for the Parent Teacher Association at Meadows School, Fort Hood, Texas from 1974 to 1975 (Kelley, Ex. #3, p. 5).

22. Mrs. Kelley has no prior broadcast experience.

Auxiliary Power

23. The Kelleys will install an auxiliary generator at their transmitter site to permit continued operation in the event of power outages (Kelley, Ex. #4).

Conclusions of Law

24. The Kelleys filed their application for the Nolanville, Texas facility on August 21, 1987 while still living in Wichita Falls, Texas. On October 20, 1987, the Kelleys leased an apartment in Harker Heights, Texas, at a point within the service area of their proposed station (Kelley, Ex. #2, 2; Tr. 105). Based on their testimony, the Kelleys stayed in their leased apartment for two to four days, and then returned to their home in Wichita Falls, Texas (Tr. 106). Four or five days later, they returned to their leased apartment in Harker Heights, Texas, where they remained until October 1988 when they moved the rest of their possessions from Wichita Falls, Texas to a rented house in Harker Heights, Texas (Kelley, Ex. #2, p. 3; Tr. 107). The Kelleys claim a service area residence credit from November 1, 1987 to the present.

25. Colonel Kelley, on October 30, 1987, filed an amendment with this Commission reflecting the Kelleys' new address in Harker Heights, Texas. He also notified the Wichita Falls, Texas appraisal district on that date that they were no longer entitled to a homestead property exemption since they had moved to Harker Heights, Texas (Kelley, Ex. #5; Tr. 194-95). The record indicates, however, that the Kelleys continued to travel back and forth between Harker Heights, Texas and Wichita Falls, Texas at the very least throughout the winter season 1987-1988. Colonel Kelley, by his own admission, went to Wichita Falls, Texas approximately every other weekend in an attempt to sell his house (Tr. 199, 223). He also continued to practice law in Wichita Falls, Texas using an office in his home in that town and did not start practicing law in Harker Heights, Texas area until March of 1988 (Kelley, Ex. #2, p. 2; Tr. 199). Mrs. Kelley, on her part, testified that she voted in the presidential primary in June 1988 in Wichita Falls, Texas.

26. It is clear, therefore, that the Kelleys continued to spend time in Wichita Falls, Texas, until, in all likelihood, they moved their final possessions from Wichita Falls to Harker Heights in October 1988. The Kelleys clearly have a motive to stress their residence in Harker Heights and to minimize their contacts with Wichita Falls, Texas. The record demonstrates, however, that there was much movement back and forth between the two communities. The Presiding Judge finds, therefore, that the Kelleys were less than full-time residents of Harker Heights, Texas from October 1987 until October 1988, and their claim of full-time service area residence will be diminished accordingly. The record entitles them, however, to a full-time service area residence credit for the periods between June 1973 and July 1975 and June 1982 and July 1986.

27. The Kelleys claim a 100 percent quantitative integration credit on the basis of their proposal to be integrated on a full-time basis into the management of the station. Colonel Kelley and Mrs. Kelley will jointly make managerial decisions and both will be involved in the management of the station (Tr. 160). He will be General Manager, and Mrs. Kelley, as Sales Manager, will hire and supervise the sales and clerical persons, and will also spend time on sales (Tr. 30, 31, 35). In addition, Mrs. Kelley will be responsible for the station's EEO program (Tr. 75, 160).

28. Colonel Kelley and Mrs. Kelley filled out the Nolanville, Texas application form (Tr. 39-40). Together they went out and located the transmitter site, and Mrs. Kelley spoke to the owner of the site (Tr. 40). Although Colonel Kelley established the public inspection file on his own, Mrs. Kelley went with him from time to time to place documents in the file (Tr. 63). Colonel Kelley filed the public notices in the newspaper (Tr. 64), but they jointly prepared the cost estimates for their proposal (Tr. 69). Mrs. Kelley worked on the salary figures for the station (Tr. 69-70), and she contributed her own funds to the venture (Tr. 76).

29. Although Colonel Kelley practices law in both Wichita Falls and Harker Heights, Texas, there is no indication in the record that his present practice of law will interfere in any way with his commitment to the Nolanville, Texas broadcast facility. Colonel Kelley is committed to discontinue his practice of law in Harker Heights, Texas in order to meet his integration commitment to the Nolanville, Texas facility. The majority of his legal practice is now in Harker Heights, Texas, and he spends only one day a week in Wichita Falls, Texas (Tr. 149-150). Therefore, even if he continues to practice law in Wichita Falls, Texas one day a week, such a limited amount of time will not interfere with his commitment to the Nolanville, Texas broadcast facility.

30. The Presiding Judge concludes, therefore, that the evidence of record supports the finding that both Colonel and Mrs. Kelley have had meaningful roles in the prosecution of their application and both are prepared to assume managerial responsibilities at the Nolanville, Texas station. Their integration proposal is found to be credible, and the Kelleys will receive a 100 percent quantitative integration credit, qualitatively enhanced by their less than full-time residence in the service area of their proposed station between October 1987 and October 1988, their past full-time residence within that area during two earlier periods with slight involvement by both Colonel and Mrs. Kelley in the civic activities of the community, and their commitment to continue to reside within the service area. Their quantitative integration credit is further qualitatively enhanced by Mrs. Kelley's gender and Colonel Kelley's past broadcast experience.

VAL-JO COMMUNICATIONS, INC.

Findings of Fact

31. Val-Jo is a corporation with only one class of stock. Each share of stock is entitled to one vote. Its officers, directors, and stockholders are as follows:

William J. Jones: President, Director, and holder of 51 percent of the stock; and

Marilyn S. Vale: Secretary-Treasurer, Director, and holder of 49 percent of the stock (Val-Jo, Ex. #1).

Diversification

32. With the exception of a *de minimis* partnership interest in a cable system company,[2] neither Val-Jo nor anyone of its principals, has any interest in any medium of mass communications (Val-Jo, Ex. #2).

33. As of the date of the hearing, Mr. Jones was employed by Waco Communications which offers paging services. He has indicated that he will terminate this employment with the firm if Val-Jo's application is granted in order to devote full-time to his duties with Val-Jo (Val-Jo, Ex. #5, pp. 2-3).

Best Practicable Service

William J. Jones

34. Mr. Jones will be the full-time General Manager of Val-Jo's proposed station. In that position, he will be responsible for the station's day-to-day operations, as well as for supervising all of its employees and for the implementation of the station's Equal Employment Opportunity Program (Val-Jo, Ex. #4). Along with Mrs. Vale, he will also keep himself informed of community activities and interests and represent the station in the community at large (Tr. 309).

35. Mr. Jones has lived in Nolanville, Texas since 1985 (Val-Jo, Ex. #5). Prior to that time, he lived in Copperas Cove, Texas which is within the 1 mV/m contour of Val-Jo's proposed station (Val-Jo, Ex. #5). Mr. Jones served as Secretary-Treasurer and charter member of the Nolanville Lions Club from November 1985 to the present and was instrumental in starting-up the Nolanville club, and with the Nolanville Volunteer Fire Department, as an emergency medical technician, from June 1985 to the present. In addition, he was President of the Bell County Communications Professionals' Association from June 1985 to 1986, representative for Nolanville, Texas, for the United Way Campaign for 1987 and 1988, and a Member of the Chamber of Commerce of Temple, Texas from 1985 to the present. Mr. Jones held the position of Nolanville City Councilman between July 1985 and April 1986 and again from June 1988 until November 1988 (Val-Jo, Ex. #5, p. 2).

36. Mr. Jones served as an account executive at stations KIXS and KIIZ, Killeen, Texas from 1984 to 1986, and held a similar position at stations KOOV, Copperas Cove, Texas, from 1986 to 1988, and at radio stations KIXS and KIIZ, Killeen, Texas and KTEM and KPLE, Temple, Texas in 1988 (Val-Jo, Ex. #5, p. 2). Mr. Jones never held a management position at anyone of these radio stations.

Marilyn Vale

37. Mrs. Vale will serve as full-time Comptroller-Business Manager and Director of Public Affairs at Val-Jo's proposed station. She will be responsible for all of the business and finance related operations of the station, including traffic, as well as the supervision of those staff members involved in the station's public affairs programming (Val-Jo, Ex. #4). She and Mr. Jones will work together in establishing station policy (Tr. 268) and in running the station on a day-to-day basis (Tr. 338).

38. Mrs. Vale has lived in Salado, Texas since May 1987. Prior to that time, she lived in Killeen, Texas from January 1964 until May 1987. Salado and Killeen, Texas are both located within the proposed 1 mV/m contour of Val-Jo's proposed station (Val-Jo, Ex. #6). Mrs. Vale has been a member of ALANON Family Group from 1982 to 1988, serving as Group Representative, District Representative, District Public Information Coordinator and Chairperson of the East Texas Area Convention. She is also a past member of the Central Christian Church of Killeen, Texas, Fowler PTA, Clifton Park PTA and is presently a member of Salado Church of Christ, Village Artist, Salado, Texas and the Ladies Auxiliary of the Salado Chamber of Commerce (Val-Jo, Ex. #6, p. 2).

39. Mrs. Vale has no prior broadcast experience.

Auxiliary Power

40. Val-Jo will maintain auxiliary power facilities at its studio site and at its transmitter location (Val-Jo, Ex. #3).

Conclusions of Law

Diversification

41. Neither Val-Jo nor any of its principals is subject to a diversification demerit.

Best Practicable Service

42. Mr. Jones and Mrs. Vale, who have known each other professionally for some time, (Tr. 302) met and agreed to pursue the Nolanville, Texas broadcast facility as a corporation (Tr. 361) with Mrs. Vale furnishing the funds for the prosecution of the application and Mr. Jones the broadcast expertise (Tr. 289-290). Mrs. Vale has also agreed to provide the funding for the construction and operation of the station (Tr. 361, 320). Mr. Jones has not put up any money towards the expense of prosecuting Val-Jo's application, and he is not obligated to repay Mrs. Vale for any portion of Val-Jo's prosecution costs (Tr. 308, 374-75). Mr. Jones received his 51 percent share of the stock in the applicant in return for service to be rendered in the future (Tr. 308).

43. Mrs. Vale testified that she never considered applying for the Nolanville facility on her own (Tr. 361) since she has no management experience at a radio station whereas Mr. Jones has worked at a number of radio stations in the past (Tr. 317-18). The structure of the applicant, according to Mrs. Vale, reflects Mr. Jones' broadcast experience and her reluctance to assume control of the applicant (Tr. 362).

44. Mr. Jones developed the proposed station's staffing proposal (Tr. 345) and he prepared the cost estimates for the construction and operation of the station (Tr. 346). He also secured the proposed transmitter site and selected

the broadcast equipment (Tr. 346-47). Mrs. Vale obtained the financing (Tr. 346), and she has signed all the checks and paid all of the expenses pertaining to the proposed station (Tr. 347). Mr. Jones and Mrs. Vale jointly made the decision that she would serve as Comptroller and Business Manager and Director of Public Affairs for the station (Tr. 363).

45. There is no evidence of record which calls into question the sincerity of Mr. Jones and Mrs. Vale integration commitment to Val-Jo's proposed station or their ability to carry out that commitment. Both principals testified at the hearing that they would terminate whatever other employment they might have at the time to meet their respective commitments (Val-Jo, Ex. #s 4, 5 and 6). Their testimony stands uncontradicted. The fact that such representations were not made in the integration proposal filed by Val-Jo in this proceeding on November 29, 1988 is immaterial, since no such requirement was imposed on the applicants in this proceeding either by the Presiding Judge or by the Commission.

46. The relationship between the two principals, as evidenced by their past actions in prosecuting this application, appears to guarantee the continued involvement of both principals in the affairs of the applicant. Mrs. Vale needs Mr. Jones' broadcast skills because she has none, and Mr. Jones must rely on Mrs. Vale's continued participation in the venture since he needs Mrs. Vale's financial resources and cannot finance the station without her. Accordingly, the Presiding Judge finds that Val-Jo's integration pledge is totally credible and that Val-Jo is entitled to a 100 percent quantitative integration credit for its proposal to integrate Mr. Jones and Mrs. Vale into management positions at the proposed station.

47. Mr. Jones has been a resident of the city of license since April 1985, two years prior to the filing of Val-Jo's application. He began his involvement in the civic activities of Nolanville, Texas in June 1985, and continues to be involved to a moderate degree in these activities. He also has had approximately four years of non-managerial broadcast experience. Mrs. Vale has lived within the 1 mV/m contour of Val-Jo's proposed station since 1964, with only a slight degree of civic involvement, and she has no prior broadcast experience. Accordingly, the Presiding Judge finds that Val-Jo's 100 quantitative integration credit is qualitatively enhanced by Mr. Jones short-term residence in the city of license with a moderate amount of civic involvement, and Mrs. Vale's long-term residence with the service contour of the proposed facility, with slight civic involvement. It is further enhanced by Mrs. Vale's gender and to a very slight degree by Mr. Jones prior broadcast experience.

MARTHA JEAN SULLIVAN

Findings of Fact

48. Martha Jean Sullivan is a individual applicant (Sullivan, Ex. #1).

Diversification

49. Neither Mrs. Sullivan nor any member of her immediate family owns any interest in any medium of mass communications (Sullivan, Ex. #2).

50. Mrs. Sullivan's son, Steven Sullivan, is employed at radio stations KTON(AM) and KNCT(FM) (Tr. 420). Radio station KTON(AM) is licensed to Belton, Texas. Radio station KNCT(FM) is the non-commercial educational station licensed to Central Texas College, Killeen, Texas (Sullivan, Ex. #3, p. 3). Steven Sullivan will not work at Mrs. Sullivan's proposed radio station (Tr. 428).

51. Mrs. Sullivan will serve as General Manager of her proposed station on a full-time basis, at least forty (40) hours a week (Sullivan, Ex. #3, p. 1). As General Manager, Mrs. Sullivan asserts that she will have the primary and ultimate responsibility for all decisions affecting the Nolanville station's day-to-day and long-range operations (Sullivan, Ex. #3, p. 1).

52. Mrs. Sullivan has resided within the 1 mV/m contour of her proposed station since 1976 (Sullivan, Ex. #3, p. 2). Her residence is located 2.5 miles South of Youngsport, Texas (Sullivan, Ex. #3, p. 1). From 1976 until 1988, Mrs. Sullivan belonged to the Florence United Methodist Church serving on the Worship Committee (1980 to 1987), as historian (1980-87), as Fall Festival Chairman (1987), as a Sunday School Teacher (1985 to 1987), and on the Tape Ministry for Senior Citizens (1986 to 1987) (Sullivan, Ex. #3, p. 1). The congregation's activities serve people who live within the proposed service area of Sullivan's station, although the church itself is located outside of that area (Tr. 444-45). From 1976 until 1980, Mrs. Sullivan was involved in the Florence Independent School District (F.I.S.D.) Chapter of the Boy Scouts of America, serving as Troop Treasurer, and as a Den Mother as well as Coordinator for the Cub Scouts (Sullivan, Ex. #3, pp. 2-3). This chapter serves Youngsport, Texas and the surrounding area including the location of Mrs. Sullivan's residence which falls within the Florence I.S.D. (Sullivan, Ex. #3, p. 3). Mrs. Sullivan has been a member of the Florence I.S.D. Parent-Teacher organization since 1976 serving as Treasurer of the local office for the Florence I.S.D. from 1987 until the present (Sullivan, Ex. #3, p. 3), and a member, since 1980, of the ATPE Educational Association (Sullivan, Ex. #3, p. 3; Tr. 392). Since February 1988, Mrs. Sullivan has volunteered time at radio station KNCT(FM), Killeen, Texas, the non-commercial educational station licensed to Central Texas College (Sullivan, Ex. #3, p. 3), working on an average of 2-1/2 hours a week (Sullivan, Ex. #3, p. 3).

53. Mrs. Sullivan does not claim any enhancement credit for prior broadcast experience.

Auxiliary Power

54. Mrs. Sullivan will install auxiliary power facilities at both the studio and transmitter locations of the Nolanville, Texas station (Sullivan, Ex. #4).

Conclusions of Law

Diversification

55. Mrs. Sullivan's application is not subject to a diversification demerit of any degree.

Best Practicable Service

56. Mrs. Sullivan contacted Jim Price at Sterling Communications and informed him of her interest in acquiring a radio broadcast facility, and he in turn contacted her when the Nolanville, Texas frequency became available (Tr. 399-401). Mr. Price selected her broadcast

equipment, supplied her with written cost estimates, located the proposed transmitter site and, finally, prepared the Sullivan application (Tr. 405-06, 409, 436). Mrs. Sullivan consulted with Mr. Price about legal counsel (Tr. 401). Her husband, Mr. Sullivan, contacted the transmitter site owner, and he asked the owner's agent to write a site availability letter (Tr. 401, 433-34). The letter was mailed to Mrs. Sullivan at the address of the Hobby Center, a business wholly owned by Mr. Sullivan (Tr. 408, 433-34). Mrs. Sullivan executed a check drawn on the Hobby Center payable to F.C.C. for the initial application fee (Tr. 408). Mr. Sullivan also executed checks drawn on the Hobby Center account payable to the Killeen Daily Herald in payment for Sullivan's public notices (Tr. 413, 430-31; Capricorn, Ex. #s 10, 11). Although Mrs. Sullivan has authority to write checks on the Hobby Center account, Mr. Sullivan maintained the check book, wrote out most of the checks, receives the bank statement, and balances the checkbook (Tr. 432-33). Another check drawn on the Hobby Center account and payable to Sterling Communications was executed by Steven W. Sullivan, Mrs. Sullivan's son (Tr. 410, 427; Capricorn, Ex. # 9). Mrs. Sullivan, on the advice of counsel, subsequently reimbursed the Hobby Center for the four checks executed by her husband and son (Tr. 414, 419, 453; Sullivan, Ex. # 7; Tr. 828).

57. Mrs. Sullivan's participation in the application process appears to have been minimal and passive to a degree that undermines her claim that she will be actively involved in the management of the station. The record demonstrates that she has relied upon others for virtually every aspect of her application. Mr. Price of Sterling Communications selected the proposed station's equipment, supplied her with written cost estimates, located a transmitter site, and prepared the application form. Mr. Sullivan then contacted the owner of the proposed transmitter site and secured the antenna site availability letter. He also took responsibility for reimbursing the newspaper for publishing applicant's original public notices. Even her decision to reimburse the Hobby Center for these expenses, including the payment to Sterling Communications, was made on the advice of counsel and not on her own initiative (Tr. 419). Mrs. Sullivan's claim that she personally prepared the cost estimates based upon input from Mr. Price (Tr. 405), obtained the bank commitment letter (Tr. 406), retained counsel and regularly communicates with her lawyer about the application (Tr. 452), does not convince the undersigned, based on the totality of the record, that Mrs. Sullivan will be in control of the enterprise. It is noted, for example that when asked at the hearing if she knew of the significance of the Advertisement of Notice of Proposed Construction or Alteration Produced by the Federal Aviation Administration, she responded that she did not (Tr. 426). Her lack of knowledge of such an important document does not lend credibility to her claim that she has been the controlling force behind her application. Accordingly, Mrs. Sullivan's integration pledge will not be credited.

58. However, in the event that Sullivan is awarded a 100 percent quantitative integration credit on appeal, it would be qualitatively enhanced by her long-term residence within the service area, a fact which was not challenged at the hearing, with slight civic involvement. It is further enhanced by Mrs. Sullivan's decision to move to the city of license in the event that she is successful applicant and by her gender.

59. One final matter requires consideration. Mrs. Sullivan is presently employed as a teacher with the Florence Independent School District. She has signed a one year renewable contract. Mrs. Sullivan testified that she has informed the school officials that she will resign if awarded the license and that they have indicated that they would release her from her contract (Tr. 453). There is no evidence of record that disputes these claims. It appears, therefore, that her contract of employment with the Florence Independent School District will not prevent her from fulfilling her integration pledge.

CAPRICORN BROADCASTING COMPANY, INC.

Findings of Fact

60. Capricorn is a Texas corporation. Nancy L. Felix serves as the corporation's President and Director with 50 percent of the voting stock and Dennis E. Bolding as Secretary and Director with 50 percent of the voting stock (Capricorn, Ex. #1).

Diversification

61. Neither Capricorn nor its two shareholders has any interest in or connection with any medium of mass communications (Capricorn, Ex. #1; Ex. #2, at p. 1; Ex. #3, at p. 1).

Best Practicable Service

62. Ms. Felix will be the station's full-time general manager, devoting a minimum of forty (40) hours a week to her duties at the station. As General Manager, she will oversee all aspects of the management and operation of the proposed station. Ms. Felix, along with the station manager, will be responsible for hiring and supervising all of the station's employees (Capricorn, Ex. #2, at p. 1).

63. Ms. Felix resided full-time in Temple, Texas, which is located within the service area of Capricorn's proposed station, from 1948 to 1966, and part-time, while attending college, from 1966 to 1970. Ms. Felix returned to Temple, Texas in 1976 and has resided there continuously since then (Capricorn, Ex. #2, at p. 6). Ms. Felix was a member of the Altrusa Club, a professional women's organization from June 1977 to December 1980, serving as a member of its Board of Directors from December 1979 to December 1980 (Capricorn, Ex. #2, at p. 2). She has also been a member of the Temple City Theatre since 1979, serving as a member of its Board of Directors from October 1979 to October 1981. In addition, Ms. Felix was a member of the Chamber of Commerce of Temple, Texas from March 1976 to July 1989, and the Belton, Texas and Killeen, Texas Chambers from 1985 to July 1989. She has also been a member of the Association of the United States Army since October 1985, and the Temple, Texas Junior League since May 1987, serving as a volunteer in the intensive care unit of a local hospital from September 1987 to May 1988 and with the Temple Mental Health Association in 1988. Since September 1989, Ms. Felix has served on the Advisory Board of the School of Telecommunications at Central Texas College in Killeen, Texas. She has also been a member of the First Presbyterian Church of Temple, Texas since June 1981 (Capricorn, Ex. #2, pp. 2-4).

64. From May 1971 to May 1973, Ms. Felix was a full-time account executive at station KOWL(AM), South Lake Tahoe, California. She subsequently served as Sales Manager at station KOWL(AM), from June 1973 to December 1975, and then held a variety of positions at stations KTEM(AM) and KPLE(FM), Temple, Texas including Operations Manager, Account Executive and Sales Manager from 1976 to 1985. She became full-time Sales Manager of KTON(AM) and KTQN(FM), Belton, Texas in October 1985, and from November 1986 to July 1989 served as full-time General Manager (Capricorn, Ex. #2, at pp. 4-5).

Dennis E. Bolding

65. Mr. Bolding will be the proposed station's full-time Station and Sales Manager. He will devote a minimum of forty (40) hours a week to his duties at the station (Capricorn, Ex. #3, at p. 1). As Sales Manager, he will supervise the station's sales staff while promoting the station with local, regional and national advertisers. As Station Manager, he will oversee all aspects of the management and operations of Capricorn's proposed station. He will also be responsible, along with the General Manager, for hiring and supervising all of the station's employees (Capricorn, Ex. #3, at p. 1).

66. Mr. Bolding has resided within the service area of Capricorn's proposed station from October 1975 to July 1989 (Capricorn, Ex. #3, at p. 2). Since July 1989, he has resided temporarily in Lampasas, Texas, which is located outside the 1 mV/m contour of Capricorn's proposed station (Tr. 765) while his permanent residence is Belton, Texas is being remodeled (Tr. 765). He will relocate to the service area when the remodeling is completed (Capricorn, Ex. #2, at p. 2; Tr. 765). Mr. Bolding has been involved in a number of civic organizations and activities which serve Nolanville, Texas and other communities within the service area of Capricorn's proposed station. He is a founder, and has been President, Treasurer and a member of the Bell County "100" Club since 1984, and since 1981, served as Building Chairman, and as a member of its Board of Directors. He is presently, a member of the Advisory Board of the Bell County Expo Center. Mr. Bolding also served on the Board of Directors of the Children's Rehabilitation Center of Central Texas from 1980 to 1987, as Chairman of the Livestock Auction from 1981 to 1987, and as Vice President from 1984 to 1987. Mr. Bolding is a former member of the original Board of Directors of Temple Crime Stoppers. In addition, he has been a member and has held leadership positions with the Masonic Temple, Temple, Texas since 1979, with the Association of the United States Army, Ft. Hood Chapter and the Bell County Youth Fair from 1976 to the present, and with the Belton, Killeen, and Temple Chambers of Commerce and the Central Texas Cutting Horse Association since 1975. Mr. Bolding became a member of the Texas Association of Business in 1976 and remains a part of that organization. He is also a former member and office holder, between 1975 and 1988, of the Wholesale Beer Distributors of Texas and the Bell County Beer Distributors Association. Since 1986, Mr. Bolding has been a member of Bell County Sheriff Posse, and in 1987 he received an award from the Texas Professional Rodeo Cowboys Association for helping to establish a rodeo for the Bell County Youth Fair and the Texas Rodeo Cowboys Association which raise funds for scholarships for outstanding students of agriculture (Tr. 783-784) (Capricorn, Ex. #3, at pp. 2-5).

67. Mr. Bolding has no prior broadcast experience.

Auxiliary Power

68. Capricorn will install and maintain auxiliary power generators at its transmitter and studio locations (Capricorn, Ex. #4, at p. 1).

Conclusions of Law

Diversification

69. Neither Capricorn nor its principals is subject to a diversification demerit.

Best Practicable Service

70. Mrs. Felix was the driving force behind the formation of Capricorn. She first learned of the availability of the Nolanville, Texas frequency from a Washington attorney, Erwin Krasnow (Tr. 696). She then contacted Mr. Bolding (Tr. 698) whom she had known for ten (10) years and with whom she has had a business relationship (Tr. 705), and she informed him that she wanted him to be her partner in this venture.

71. Mrs. Felix chose the name of the applicant (Tr. 754), and she signed Capricorn's application as President (Tr. 737), acquiring her stock in the corporate applicant in return for services performed for Capricorn (Tr. 705, 730-31). Mr. Bolding, her fellow stockholder, paid for his stock when he made the initial deposit in the applicant's bank account (Tr. 811). He has also furnished all the funds necessary for the prosecuting the application, including the initial funds to open the above referenced account (Tr. 738, 758). Mrs. Felix, however, paid for the expenses she incurred on her trip to Washington, D.C. for the hearing (Tr. 705-06). Both principals have agreed, however, in the event that Capricorn is the successful applicant, that Mrs. Felix will repay Mr. Bolding one-half of Capricorn's prosecution expenses out of her share of the profits of the proposed station (Kelley, Ex. #7; Tr. 707). Mr. Bolding does not expect to be reimbursed by Capricorn for the other half of the prosecution expenses (Tr. 710); nor will he be entitled to additional stock as a form of repayment (Tr. 797). In the event that Capricorn receives the license for the Nolanville, Texas facility, Capricorn will rely either on a loan from a financial institution or from Mr. Bolding for the necessary funds to build and operate the facility.

72. Mrs. Felix hired applicant's communications counsel and secured the name of applicant's engineer (Tr. 701). She also prepared a draft of Capricorn's application (Tr. 702), and she established and is responsible for maintaining Capricorn's public inspection file (Tr. 679, 703, 791). Mrs. Felix also handled both newspaper publications of local notice (Tr. 792), and she has written all the checks drawn on Capricorn's account with the exception of one check executed by Mr. Bolding while she was out of town (Tr. 706, 789). Cost estimates supplied by Capricorn's engineer were sent to Mrs. Felix's address (Tr. 792), and she prepared the cost estimates for the first three months of operation (Tr. 702, 793).

73. Mr. Bolding secured Capricorn's financial commitment (Tr. 704-05). Both he and Mrs. Felix have the authority to sign checks on the corporate account (Tr. 706) and, as noted above, on one occasion he drafted a check on that account. Mr. Bolding and Mrs. Felix have had several business meetings before Capricorn was incorporated (Tr. 700), including a meeting in their local attorney's office shortly before Capricorn's application was filed, during which they directed counsel to form a corporation, and on that very day counsel reserved the corporate name (Tr. 736, 752-53). They also jointly opened a checking account for Capricorn (Tr. 757), and together met with the president of a lending institution and secured Capricorn's reasonable assurance of the necessary financing (Tr. 703, 793). Mr. Bolding also reviewed the cost estimates for constructing and operating the station (Tr. 792), and he along with Mrs. Felix, located the transmitter site (Tr. 790). Mr. Bolding also helped prepare Capricorn's application (Tr. 790) which was put in final form in his office, and he reviewed the local public notices announcing the filing of Capricorn's application for the Nolanville, Texas frequency and its designation for hearing (Tr. 791). In addition, Mr. Bolding visited Capricorn's public inspection file and inspected those of the other applicants in this proceeding (Tr. 804-05). He also had a role in answering the written interrogatories served on Capricorn (Tr. 785) and, although pleadings and other materials relating to the Capricorn's application were mailed to Mrs. Felix's at Capricorn's address, he was provided with copies of all of these materials (Tr. 794).

74. The Presiding Judge concludes, therefore, based on the evidence of record, that both Capricorn's principals have been actively involved in the prosecution of Capricorn's application. Clearly, Mr. Bolding has been more than just the mere provider of the funds for the prosecution of the application, and his pledge to be integrated into the management of Capricorn's proposed station is entirely credible.

75. Mrs. Felix and Mr. Bolding have committed themselves to work a minimum of 40 hours a week at Capricorn's proposed Nolanville facility. There is no evidence of record which calls into question the sincerity of those commitments or their ability to carry them out. Mr. Bolding is a relatively young man (Tr. 780). Although new to broadcasting, he has indicated that he wishes to embark on a new career. His present investments and other business activities are either passive (Tr. 781), or he employs individuals to manage these interests (Tr. 782, 801-02). Little or no amount of time will be required of Mr. Bolding to oversee these activities. It does not appear, therefore, that he will be prevented from fulfilling his integration pledge to Capricorn by his other investments. He has also indicated that he will curtail, if necessary, his civic activities so as not to interfere with his full-time integration commitment to the Nolanville broadcast facility (Tr. 807).

76. The Presiding Judge finds, therefore, that Capricorn is entitled to a 100 percent quantitative integration credit which is qualitatively enhanced by Mrs. Felix and Mr. Bolding's long-term and continuing residence within the service area of Capricorn's proposed station with, in the case of Mrs. Felix and Mr. Bolding their moderate amount of civic involvement, and by Mrs. Felix's gender and her significant past broadcast experience.

77. One final matter regarding Capricorn requires consideration. Mrs. Felix signed the application which was filed on August 27, 1982 as President of Capricorn, believing the applicant to be a corporation yet to be formed (Tr. 737). At the time Capricorn's application was filed, it was not a corporation, although local counsel had filed the corporate name with the appropriate Texas governmental body. Capricorn's Articles of Incorporation were executed on September 8, 1987 and filed with the State of Texas on September 14, 1987 (Capricorn, Ex. #1, Kelley, Ex. #6, p. 1), and the By-Laws were adopted on September 17, 1987 (Kelley, Ex. #6, pp. 1-2). Capricorn, as a legal corporate entity, therefore, came into existence on September 14, 1987, 18 days after Capricorn's application was filed. On September 17, 1987, Ms. Felix and Mr. Bolding executed a consent to action taken in lieu of organizational meeting of directors, whereby Ms. Felix was elected President and Mr. Bolding Secretary (Kelley, Ex. #6, p. 2).

78. Prior to its actual incorporation and before the filing of its application, Capricorn's principals had committed themselves to the corporate form, even to the point of reserving its corporate name. All the necessary steps to incorporate were taken prior to and just after the filing of Capricorn's application, and well before the so-called B cut-off date in this proceeding. Furthermore, the principals have at all times adhered to the structure presented in Capricorn's application. The Presiding Judge concludes, therefore, in light of the actions taken by Capricorn's principals, both before and immediately after the filing of Capricorn's application, that the mere fact that Capricorn did not have all of its organizational documents in place at the time it filed its application does not raise any doubts as to the legitimacy of the applicant. *See Coast TV* 4 F.C.C. Rd. 1786, 1788 (1989).

COMPARATIVE COVERAGE

79. A Joint Engineering Stipulation was submitted by the Applicants, supported by an engineering statement from Robert A. Bednarek, of Rubin, Bednarek & Associates, Inc., a consulting engineering firm. The study demonstrates that the areas to be served by the various applicants presently receive at least five daytime aural services, and that there is a difference of only 905 people between the largest population proposed to be served by Sullivan and the smallest by Val-Jo, a figure amounting to less than 1 percent. Based on these findings, the applicants jointly waive any preference or benefit under the comparative coverage criterion of the Commission's comparative analysis (Joint Engineering Stipulation).

ULTIMATE CONCLUSIONS

80. None of the four applicants has been charged with a diversification demerit. Therefore, all four are on an equal footing under the diversification criterion. However, under the best practicable service criterion, only the Kelleys, Val-Jo and Capricorn have been found to be entitled to an integration credit and all three are entitled to an auxiliary power source credit. Since all three propose 100 percent integration of ownership into management, the sole distinguishing factor among the three is the degree to which their quantitative integration credit of 100 percent is qualitatively enhanced.

81. The Kelleys have been found to be entitled to a less than a full-time resident credit for Colonel Kelley and Mrs. Kelley, whereas, both Val-Jo and Capricorn have been found to be entitled, in the case of Val-Jo to a 51 percent full-time city and 49 percent full-time service area resident credit and Capricorn a 100 percent full-time service area resident credit. There are no aspects to the Kelleys' proposal which enables them to overcome Val-Jo and Capricorn's clear preference over the Kelleys under the residence enhancement factor, and the decision as to which proposal will best serve the public interest, therefore, will turn on a further comparison of the Val-Jo and Capricorn proposals.

82. Considering the qualitative enhancements to which each of these two applicants is entitled, the Presiding Judge finds that the decision as to which proposal is superior is an exceedingly close one. However, considering all pertinent factors, the Presiding Judge concludes that Capricorn's proposal will best serve the public interest primarily because of the more significant involvement of its principals in the civic activities of their community and, to a further, slight degree because of Ms. Felix more significant past broadcast experience. It is noted that Mr. Jones, Val-Jo's 51 percent owner, is the only Nolanville, Texas resident among Val-Jo and Capricorn's principals. However, Mr. Jones became a resident of Nolanville, Texas, just two years prior to the filing of Val-Jo's application, and both of Capricorn's principals have been long-term residents of its proposed service area. The slight advantage due Val-Jo for its 51 percent city of licensee resident credit is, the Presiding Judge believes, outweighed by the more significant involvement of Capricorn's principals in the civic affairs of their community. The difference between the 50 percent gender preference awarded Capricorn and the 49 percent awarded Val-Jo is found to be *de minimis* and of little on no decisional significance. Accordingly, Capricorn's application will be granted.

RULINGS

IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Capricorn Broadcasting Company, Inc. (File No. BPH-870827NK) for authority to construct a new FM station or Channel 297A in Nolanville, Texas IS GRANTED; and that the applications of Oliver Kelley and Mary Ann Kelley, Joint Tenants with the Right of Survivorship (File No. BPH-870821MB; Val-Jo Communications, Inc. (File No. BPH-870827MD); and Martha Jean Sullivan (File No. BPH-870827MM) ARE DENIED.[3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

FOOTNOTES

[1] By *Order*, FCC 88M-3923, released on November 17, 1988, the Presiding Judge dismissed the applications of Camanche Gap Wireless Company and Kitty Young for failure to prosecute and by *Order*, FCC 89M-2287, released September 18, 1989, the Presiding Judge dismissed with prejudice the application of Texas FM Limited Partnership.

[2] Marilyn Vale and her husband own approximately 0.0093 percent of the issued and outstanding partnership units of Galaxy Cablevision, L.P. which has cable television systems in Arkansas, Illinois, Kentucky, Louisiana and Texas (Val-Jo, Ex. #10).

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-10

In re Applications of	
WAYNE G. MULLIGAN, RICHARD D. BUCKLEY, JR., and RICHARD S. KORSEN d/b/a RANCHO MIRAGE RADIO, A GENERAL PARTNERSHIP	File No. BPH-870331MZ
HUGH R. PAUL	File No. BPH-870331PN
SUNDIAL RADIO BROADCASTERS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-870421MC
DANIEL P. MITCHELL	File No. BPH-870422MB
ISABELLE DRAKE d/b/a DRAKE BROADCASTING	File No. BPH-870422ME
ANNE K. WALLACE and WILLIAM F. WALLACE	File No. BPH-870422MJ
For Construction Permit for a New FM Station on Channel 258A in Rancho Mirage, California	

Appearances

Martin L. Leader, David D. Oxenford, and *Lisa C. Wilson,* on behalf of Wayne G. Mulligan, Richard D. Buckley, Jr., and Richard S. Korsen d/b/a Rancho Mirage Radio, A General Partnership; *Lawrence Bernstein* and *F. Joseph Brinig,* on behalf of Hugh R. Paul; *Morton L. Berfield* and *John J. Schauble,* on behalf of Sundial Radio Broadcasters, A California Limited Partnership; *Lewis J. Paper, Peter Scher, Paul Sinderbrand,* and *Yvette R. Glasgow,* on behalf of Daniel P. Mitchell; *Jerome S. Silber* and *Jerome S. Silber,* on behalf of Jess Drake and Isabelle Drake d/b/a Drake Broadcasting; *James A. Gammon* and *A. Wray Fitch III,* on behalf of Anne K. Wallace and William F. Wallace; and *Gary Schonman,* on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: April 30, 1991; Released: May 10, 1991

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of Wayne G. Mulligan, Richard D. Buckley, Jr. and Richard S. Korsen, d/b/a Rancho Mirage Radio, A General Partnership (RMR), Hugh R. Paul (Paul), Sundial Radio Broadcasters, a California Limited Partnership (Sundial), Daniel P. Mitchell, III (Mitchell), Isabelle Drake d/b/a Drake Broadcasting (Drake), and Anne K. Wallace and William F. Wallace (Wallaces). Each applicant seeks to establish a FM broadcast station on Channel 258A at Rancho Mirage, California.[1]

2. By *Hearing Designation Order,* DA 90-16, 5 FCC Rcd 721 (ASD 1990), the applications were consolidated for hearing on the following issues (*HDO,* para. 13):

1. To determine whether Sundial's proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. If a final environmental impact statement is issued with respect to Paul, Wallace and/or Dessert Sun in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

By *Memorandum Opinion and Order,* FCC 90M-606, released March 26, 1990, the Presiding Judge accepted a Sundial amendment and by *Memorandum Opinion and Order,* FCC 90M-2767, released September 4, 1990, resolved the city-grade coverage issue in Sundial's favor by granting its *Motion For Summary Decision.*

3. A pre-hearing conference was held on April 9, 1990. Hearing sessions were held on September 24, 25 and 26, 1990. The record was closed on September 26, 1990 and confirmed by *Order,* FCC 90M-3064, released September 28, 1990. Proposed Findings of Fact and Conclusions of Law were filed November 20, 1990; replies were filed December 21, 1990.

FINDINGS OF FACT

RANCHO MIRAGE RADIO

Ownership

4. Rancho Mirage Radio (RMR) is a general partnership comprised of three partners, each of whom has an equal vote in partnership affairs. The partners, and their

respective ownership interests in the partnership, are as follows: Richard D. Buckley, Jr. (42.5 percent), Richard S. Korsen (42.5 percent), and Wayne G. Mulligan (15 percent). Rancho Mirage Radio Exhibit 1.

Integration

5. RMR does not propose to integrate any of its partners in the day-to-day operation of the station. Rancho Mirage Radio Exhibit 2.

Diversification

6. Each of the partners of RMR has interests in other media of mass communications.

7. Richard D. Buckley, Jr. (Buckley) is the president, a director, and the beneficiary of a trust that holds 25 percent of the outstanding stock of Buckley Broadcasting Corporation, the licensee of WOR(AM), New York, New York; WDRC(AM), Hartford, Connecticut; and WSEN(AM) and WSEN-FM, Baldwinsville, New York. Buckley is also president, board chairman, 11.1 percent stockholder, and the beneficiary of a trust which holds 22.2 percent of the outstanding stock of Buckley Broadcasting Corporation of California, licensee of KKHI(AM) and KKHI-FM, San Francisco, California; KLLY(FM), Oildale, California; and KNZR(AM), Bakersfield, California. In addition, Buckley is the president, board chairman and 65.2 percent owner of Buckley Communications, Inc., licensee of KGIL(AM) and KMGX(FM), San Fernando, California. Buckley is also president, board chairman, and 75 percent owner of Buckley Broadcasting Corporation of Monterey, licensee of KWAV(FM), Monterey, California; KUBB(FM), Mariposa, California; and KSEQ-FM, Visalia, California. Finally, Buckley is the president, board chairman and 80 percent owner of Buckley Broadcasting Corporation of Maine, licensee of WYNZ(AM), Portland, Maine, and WYNZ-FM, Westbrook, Maine. Rancho Mirage Radio Exhibit 3.

8. Richard S. Korsen (Korsen) is Executive Vice President and a director of Buckley Broadcasting Corporation, licensee of WOR(AM), New York, New York; WDRC(AM) and WDRC-FM, Hartford, Connecticut; and WSEN(AM) and WSEN-FM, Baldwinsville, New York. Korsen is also a director of Buckley Broadcasting Corporation of California, licensee of KKHI(AM) and KKHI-FM, San Francisco, California; KLLY(FM), Oildale, California; and KNZR(AM), Bakersfield, California. In addition, Korsen is the Executive Vice President, a director, and 10 percent owner of Buckley Broadcasting Corporation of Maine, licensee of WYNZ(AM), Portland, Maine, and WYNZ-FM, Westbrook, Maine. Rancho Mirage Radio Exhibit 3.

9. Wayne G. Mulligan is Vice President-Engineering of Buckley Broadcasting Corporation, licensee of WDRC(AM) and WDRC-FM, Hartford, Connecticut; WSEN(AM) and WSEN-FM, Baldwinsville, New York; and WOR(AM), New York, New York. He is also Vice President-Engineering of Buckley Broadcasting Corporation of Maine, licensee of WYNZ(AM), Portland, Maine and WYNZ-FM, Westbrook, Maine.[2] Rancho Mirage Radio Exhibit 3.

Auxiliary Power

10. RMR will install auxiliary power generators to insure that its proposed station will remain in operation in the event of a power failure. Rancho Mirage Radio Exhibit 4.

HUGH R. PAUL

Ownership

11. Hugh R. Paul (Paul) is a sole proprietorship. Paul Exhibit 1 at 1.

Integration

12. If his application is granted, Paul intends to resign from all present employment and will reside within the city grade service area of the station. He proposes to be integrated as the full-time (at least 40 hours per week) General Manager of the station. Paul Ex. 1, pp. 1-2. As General Manager, Paul would be in charge of all aspects of station operation, including personnel, programming and finance. All station managerial staff will report to him. He will be responsible for the hiring and firing of all station employees and will have ultimate authority over sales, the program format, community relations and station promotions.

13. Paul owned a home in Palm Springs, California, which is within the city grade contour of the proposed station from May, 1987, after his application was filed, until his separation from his wife in early 1989. Paul's wife received the home as part of the divorce settlement. Between July and November, 1989 Paul spent most of his time in Hawaii building a radio station (which he subsequently abandoned).[3] Paul resided at his mother's leased home in Palm Springs upon his return from Hawaii in late 1989 to June 1990, when he moved to Oxford, Mississippi. Tr. 110-114.

14. While Paul claims that he has continued to maintain a residence in Palm Springs, in fact he has no such residence. The residence that he refers to is the mobile home in which his mother resides (Tr. 102). The mobile home is on a leased trailer site. The lease is in the name of his mother, or his mother and sister. His name is not on the lease. Tr. 103. Paul assisted them in purchasing the mobile home. Tr. 112. He claims that he keeps things at his mother's trailer, but also indicates that he has some things in a storage location in Palm Springs. Tr. 103. Paul asserts, assuming he gets the grant, he and his current wife would "probably" live there with his mother. Tr. 112.

15. Effective May 29, 1990, Paul became the full-time Coordinator of Engineering Services for the University of Mississippi at Oxford. Since July 1, 1990, he has been living in Oxford, Mississippi. His duties consist of overseeing the day-to-day technical operations of the University's Teleproduction Center and related satellite uplink facilities. In addition, he works with individual schools within the University in the development of broadcasting and telecommunications related projects, assisting them in developing project specifications and equipment acquisition. Paul Ex. 1, p. 1. In this capacity, Paul supervises approximately ten full-time staff members and additional part-time staff. Tr. 67. Paul has no employment agreement with the university. Paul has informed

University officials about his Rancho Mirage application but not his specific commitment to move to Mirage full-time to run his proposed FM station. Tr. 65-67, 105, 108. Paul has advised university officials that there could be circumstances that could cause him to wish to terminate his employment. He has no understanding with the University as to how much notice he must give before leaving. Tr. 110.

16. Paul claims civic activity for his membership in the Quarter Century Wireless Association, a group of amateur radio operators. Paul Ex. 1, pp. 2-3. While Paul has belonged to that organization since 1985, he only joined the chapter within his proposed service area in September 1987. Tr. 55, 63. The only purported civic activity involving that organization is a project to set up amateur radio licensing classes for older people. Tr. 106. These classes have not yet taken place; they are expected to begin in the fall of 1990 or the winter of 1991. Paul Ex. 1, p. 3.

17. Since 1987, Paul has assisted the Palm Springs Chamber of Commerce in various projects, including an automobile race. Paul Ex. 1, p. 2. Paul has never been a member of the Chamber of Commerce. Tr. 94. His employer's radio station was a member. Tr. 96. Some of the work for the Chamber of Commerce was done in conjunction with his employment. Tr. 94-95. In 1988, he supplied 300 dollars of radio equipment to the Vantage Grand Prix. Tr. 95. Paul also helped promotional people prepare radio and print copy and helped gather statistics. Tr. 96-97.

18. During his residence in Palm Springs, Paul was a member of the Desert Press Club, an organization of professional media persons that engages in projects to promote the area. Paul Ex. 1, p. 2. In 1987, he prepared reports for the City of Palm Springs with respect to the zoning of radio towers and antennas. Paul Ex. 1, p. 3. While in Palm Springs, Paul also helped the Sweet Adelines, the Northwoods Institute Foundation and the Riverside Symphony concert series in Palm Desert prepare public service announcements. *Id.*

19. Paul has the following broadcast experience:

1957-1959: WMCR-FM, Kalamazoo, Michigan. Part-time announcer and engineer while attending college; 1964: WTVN-TV, Columbus, Ohio. Full-time staff engineer;

1964-1965: WDOW-AM, Dowagiac, Michigan and WKPR-AM, Kalamazoo (both owned by Kuiper Broadcasting). Chief Engineer and sales at WDOW; announcer and engineer at WKPR;

1965-1968: Technical Director, Delta Associates, Ltd., Great Britain (designed and built broadcast facilities in the Middle East and Africa);

1968-1971: WOOD-AM/FM/TV, Grand Rapids, Michigan. Staff engineer;

1971-1973: KAAA-AM, Kingman, Arizona. Chief Engineer, announcer, sales;

1973-1989: University of Southern California, Director of Engineering, Broadcast Services. Responsible for development of new KUSC-FM facilities in Los Angeles, KFAC-FM in Santa Barbara, KCPB-FM in Thousand Oaks and KPSC-FM, Palm Springs. (All noncommercial stations);

1984-1990: President and minority shareholder of Hamakua Broadcasting Corporation, permittee of Station KHCR-FM, Paauilo, Hawaii. Personally supervised the construction of a new commercial FM facility. Paul Ex. 1, pp. 3-4.

20. Additional, since 1973 and while employed by the University of Southern California, Paul has spent up to 40% of his time as a consultant in the design and implementation of broadcast facilities, including:

1979-1980: National Educational Radio Network of Thailand. Assisted in completion of nine medium wave AM and one FM stations, and associated production centers;

1981: U.S. A.I.D. and Ministry of Education, Indonesia. Assisted in construction of TV production center;

1981-1985: The World Bank and People's Republic of China. Assisted in completion of nine UHF television stations, 24 TV production centers;

1984: Republic of Cameroon. Assisted in establishement of 13-station TV network; and

1985: Sultanate of Oman. Assisted in construction of TV production center.

Diversification

21. Paul has no ownership or other interest in any other media of mass communication. Paul Ex. 1, p. 1.

Auxiliary Power

22. Paul proposes to install emergency power generating equipment at the transmitter and studio sites, for use in the event there is an interruption in the primary power system. Paul Ex. 1, p. 6.

SUNDIAL RADIO BROADCASTERS

Ownership

23. Sundial Radio Broadcasters (Sundial) is a limited partnership organized under the laws of California. The nature and extent of the parternship interests are as follows:

Name	Type of Interest	Ownership Interest
Joyce Wade-Maltais	General Partner	20 percent
Leonard E. Walk & Florence Z. Walk, Joint Tenants	Limited Partners	60 percent
Philip K. Smith, Jr.	Limited Partner	20 percent

Sundial Exhibit 1 at 1.

Formation

24. Leonard E. Walk (Walk) is an experienced broadcaster. Between 1948 and 1973 he worked at radio stations in various capacities, and between 1956 and 1973 he had substantial ownership positions in entities which owned one or more broadcast stations. Tr. 374-77. Between 1976 and the present, he has had an ownership interest in

other entities which have filed applications for new broadcast facilities. Aside from Rancho Mirage, these entities have filed applications for new radio stations in Indianapolis, Indiana (1976), Indianapolis, Indiana (1987), Jupiter City, Florida (1989), and White City, Florida (1989). In each instance, the attorneys for the applicant were Cohen & Berfield, the same counsel representing Sundial. Tr. 384-87.

25. Subsequent to 1973, Walk acted as a consultant to many broadcast stations. In some instances, the consulting arrangement was part of the contract under which Walk's broadcast stations were sold. One example of the latter kind of consultancy involved Sheridan Broadcasting Corporation (Sheridan), which had purchased one of Walk's stations. As part of his consulting services, Walk advised Sheridan on its participation as a limited partner in Weyburn Broadcasting Limited Partnership (Weyburn), an applicant for a new FM radio stationin Richmond, Virginia. The attorneys for Weyburn were Cohen & Berfield. Tr. 377-82.

26. In late 1986 or early 1987, Walk became aware of the availability of a new FM station in Rancho Mirage. Tr. 387-88. Walk was then (and still is) living in Florida. Tr. 357, 373. Walk was familiar with the Commission's comparative criteria, and he knew that an application's chances of success would be enhanced if the principal in control was a local minority. Walk called a friend in Los Angeles to inquire about finding a local person who could be associated with Walk in filing the application for the Rancho Mirage facility. That friend (Sidney Machtinger) recommended Phillip K. Smith, Jr. (Smith), a land developer in the Rancho Mirage area. Tr. 388, 398.

27. Walk telephoned Smith and told him that he was interested in putting together a limited partnership, that Walk himself wanted to be a passive investor, and that he was looking for a local person -- preferably a minority -- who could be the "head" of the group.[3] Tr. 391-392; Mitchell Exhibit 5 (deposition of Phillip K. Smith, Jr.) at 10-11.

28. After his telephone conversation with Walk, Smith decided to raise the matter with Joyce Wade-Maltais (Wade-Maltais), a black woman who was a professor at the College of the Desert in Palm Desert, California. Smith and Wade-Maltais are board members of a local private school, and, after a board meeting, Smith approached Wade-Maltais, recapped his conversation with Walk, and asked whether Wade-Maltais had any interest in the project. Smith told Wade-Maltais that he was prepared to recommend her to Walk because she was a minority who was a local resident and active in civic affairs within the community. Wade-Maltais had some familiarity with the Commission's comparative criteria at the time of her conversation with Smith, and she understood how Walk's application could benefit by her participation. Wade-Maltais told Smith that she wanted to consider the matter. Tr. 124-28; Mitchell Exhibit 5 at 13-14.

29. Although Walk testified that he recalled telling Smith in the first conversation that he wanted to be a passive investor, and although Smith testified that he recalled Walk telling him that he was looking for someone who could be the "head" of the group Walk was forming, Wade-Maltais testified at hearing that Smith did not speak to her of any particular role that she would have with the group. According to Wade-Maltais, Smith only said that Walk was offering an investment opportunity. Tr. 126-129.

30. Shortly after talking with Smith, Wade-Maltais had dinner with Walk and his wife in the Rancho Mirage area. In that conversation, Walk explained that he was interested in forming a group and being a passive investor in the group. Tr. 134, 396. Although Walk testified at deposition that he had first mentioned the notion of forming a limited partnership in his first conversation with Smith,[5] Wade-Maltais claimed that she proposed forming a limited partnership to Walk after her first dinner conversation with him and after having consulted with certain people. Wade-Maltais further claimed that she told Walk that she wanted to be the general partner and, as such, that she wanted to have exclusive control over the partnership. Tr. 135-36.

31. Eventually Walk and Wade-Maltais (and later Smith) agreed to participate in a limited partnership under which Wade-Maltais would be the general partner. Walk then suggested that Wade-Maltais contact the law firm of Cohen & Berfield to represent the partnership. Tr. 157-158. Wade-Maltais contacted the law firm, spoke with Mr. Berfield, and probably retained the firm in that first conversation. Tr. 165, 219-21.

32. During or shortly after her first conversation with Mr. Berfield, Wade-Maltais asked Mr. Berfield to prepare a limited partnership agreement. Tr. 166, 219-21. Although they recalled that they saw at least one draft of the limited partnership agreement before signing it, none of the Sundial partners could recall any discussion about any material term in the partnership agreement. Tr. 166, 401-402; Mitchell Exhibit 5 at 20-21.

33. The typescript of the Sundial partnership agreement states that it is dated April 3, 1987. However, none of the Sundial partners could recall the precise date on which the agreement was actually signed. Tr. 370, 406; Mitchell Exhibit 5 at 20.

34. The Sundial partnership agreement is virtually identical to the Weyburn partnership agreement executed by Sheridan in consultation with Walk. For example, both limited partnership agreements state that "[t]he Partnership may be dissolved and terminated at any time before that date [twenty years after the execution of the agreement] upon the affirmative vote of the General Partner and/or Limited Partners holding in the aggregate 51% of the ownership interest of the Partnership." Sundial Exhibit 2 at 2-3 and Mitchell Exhibit 7 at 2 (emphasis added). Both Wade-Maltais and Walk testified that their respective understanding is that this provision requires the consent of the general partner (Wade-Maltais) before the partnership can be dissolved. However, neither Wade-Maltais nor Walk could cite any other provisions of the agreement which had any bearing on their understanding. Tr. 182-86, 405-06.

35. The Sundial partnership agreement states that Wade-Maltais has a 20 percent ownership interest in the partnership. Walk had initially proposed that Wade-Maltais be given a 15 percent ownership interest, but she wanted 20 percent, and both Walk and Smith agreed to that percentage. Tr. 164-65, 403, 442-43. Wade-Maltais had previously advised Walk and Smith that she had no money to contribute to the enterprise, and the partnership agreement does not obligate Wade-Maltais to pay any money for her ownership interest. Tr. 160-64.

36. Wade-Maltais testified that her 20 percent ownership interest in Sundial was in exchange for the services she was to perform for the partnership. At hearing she was asked to describe the services she had performed for her 20 percent ownership interest. Wade-Maltais testified that she arranged for the publication of local notice and discussed the preparation of a budget with Berfield and Robert E. Hoover, Sundial's engineeer. However, she did nothing to verify the budget. Tr. 307-09, 313-18.

37. Wade-Maltais' 20 percent ownership interest is not intended as compensation for her proposed position as general manager of Sundial's station. Section 12 of the Sundial partnership agreement states that the general partner will be employed full-time at the station as the general manager and "be compensated at a rate which is commensurate with the salary and benefits generally paid to General Manager at similarly situated stations." Sundial Exhibit 2 at 6. Wade-Maltais testified that she discussed the issue with Berfield and Walk and that there is now a written agreement concerning the salary she will be paid as general manager. Tr. 338-41.

38. Wade-Maltais also asked Berfield to contact a company to arrange for the leasing of equipment to be used in the event that Sundial's application was granted and a station had to be constructed. Tr. 192. Berfield eventually secured a letter from Park Leasing Company and purportedly signed by Robert W. Arnold, the chairman of the board. Mitchell Exhibit 6. Wade-Maltais herself never talked with Arnold about the lease of equipment. In fact, she does not recall communicating with anyone at Park about the lease of equipment. Tr. 193. Wade-Maltais does not know what equipment would be covered by the lease with Park Leasing Company. Tr. 320-24.

39. Section 9 of the Sundial partnership agreement obligates Walk and Smith, as limited partners, to loan the partnership up to an aggregate of $200,000 for the prosecution of the application and for the construction and initial operation of any station. The agreement does not specify terms for repayment or the security to be provided for the loans. Both Walk and Smith testified that they recognize that, if Sundial's application is denied, the funds will be lost without any recourse against the partnership or Wade-Maltais. For her part, Wade-Maltais testified that there is no circumstance under which she would be obligated to provide any funds of her own to the partnership. If partnership debts exceed $200,000, her only obligation would be to try to secure a loan for the partnership. Tr. 162, 188-89, 191-92, 399; Mitchell Exhibit 5 at 22-24.

40. Section 21 of the Sundial partnership agreement supports Wade-Maltais' view that she has no obligation to contribute funds to the partnership. That section -- which is identical to Section 21 of the Weyburn partnership agreement -- provides as follows:

> The General Partner will not be liable to the Partnership, nor to the Limited Partners, for any loss suffered by the Partnership, or the Limited Partners which arises out of his [sic] action or inaction if he [sic], in good faith, determines that such course of conduct did not constitute gross negligence or gross misconduct. The General Partner shall be defended, held harmless, and indemnified by the Partnership, for any liability or loss suffered by him [sic] by reason of conducting business on behalf of the Partnership; provided, however, that any recovery by the General Partner shall be limited to the assets of the Partnership and may not be held against the Limited Partners; provided, further, that the General Partner shall not be indemnified by the Partnership in connection with any liabilities incurred for violation of any federal or state securities law arising out of his [sic] sale of any interest in [the] Partnership.

Sundial Exhibit 2 at 13-14 and Mitchell Exhibit 7 at 13-14. Wade-Maltais testified that, under her understanding, she would be indemnified for any action she took on behalf of the partnership in good faith Tr. 190-91.

41. One action taken by Wade-Maltais concerned a transmitter site for Sundial's proposed station. She made some effort but was unable to locate an appropriate site. She then telephoned Walk, who was either in Florida or visiting in California, to ask his assistance. Wade-Maltais believes that she asked Walk to assist her before the partnership agreement was signed (but certainly after an oral agreement was reached). At his deposition in June 1990, Walk was asked whether Wade-Maltais' request for assistance was made before or after the partnership agreement was signed; in response, Walk testified as follows: "I don't remember the sequence, I would guess it would be *after* the partnership [agreement was signed]. There would be no reason otherwise." Tr. 409 (emphasis added). Walk later changed his mind and testified at hearing that he was now absolutely sure that Wade-Maltais asked his assistance on the transmitter site *before* the partnership agreement was signed. When asked to explain the discrepancy with his deposition testimony, Walk testified that, although he had not seen or experienced anything to refresh his recollection after the deposition, he had somehow come to believe that his assistance was requested before the partnership agreement was signed. Tr. 407-10.

42. Walk drove around the Rancho Mirage area but could not find a transmitter site either. Wade-Maltais then contacted Smith and asked his assistance. Tr. 170. Wade-Maltais testified that she contacted Smith before the partnership agreement was signed. Tr. 360. However, Smith testified that it seemed to him that Wade-Maltais contacted him "sometime after we had signed the limited partnership agreement." Mitchell Exhibit 5 at 27.

43. In any event, Smith did locate an appropriate transmitter site by speaking with Lewis C. Bishop, an officer with SunCrete Acquisition Corporation. Smith did not contact Wade-Maltais upon finding the site. Instead, Smith informed Mr. Berfield who in turn told Wade-Maltais. Smith then secured a letter from Bishop, dated April 6, 1987, and hand-delivered it to Wade-Maltais. Smith also contacted Walk, who idenitified the location of the proposed transmitter site on a map and sent the map to Robert E. Hoover, Sundial's engineer. Tr. 170, 411; Mitchell Exhibit 4; Mitchell Exhibit 5 at 28-30.

44. After the HDO was issued in the instant matter, a petition to enlarge was filed against Sundial based upon its allegedly false identification of the transmitter site. Although Wade-Maltais knew that Smith and Walk were supposed to remain uninvolved in management matters, she felt it was "logical" to ask Smith to straighten the matter out. Tr. 177. Despite contrary testimony which she had given at deposition, Wade-Maltais testified at hearing that she did not discuss the matter directly with Smith but instead contacted Berfield and asked him to call Smith. Tr. 174-76. For his part, Smith recalls that Wade-Maltais

telephoned him directly and asked him to assist in handling the matter. Mitchell Exhibit 5 at 32-33. Smith agreed to help and secured letters from SunCrete Acquisition Corporation to demonstrate that Sundial did in fact have reasonable assurance of a transmitter site. Mitchell Exhibit 5 at 33, 35-36 & Attachments 3, 4.

Integration

45. Professor Wade-Maltais is proposed as the full-time (40 hours or more per week) General Manager of Sundial's station. As General Manager, she purportedly will exercise supervisory control over all station operation, including programming, public service, sales, personnel, equal employment opportunity, and business affairs. Sundial Exhibit 3; Tr. 122. In the event Sundial's application is granted, Professor Wade-Maltais proposes to retire from her current position (Professor of English and Speech at the College of the Desert) and curtail any other activities in order to effectuate her integration proposal. *Id.*

46. Since 1971, Professor Wade-Maltais has resided in Palm Desert, California, within the city-grade contour of Sundial's proposed Station. From 1966 to 1971, she resided in Indio, California, located within the 1 mV/m contour of Sundial's proposed Station. Ms. Wade-Maltais is a black female. *Id.*

47. Professor Wade-Maltais's civic and community activities within Sundial's proposed service area include the following (*Id.*).

National Charity League, Coachella Valley Chapter, member since 1985, also served three years as chairperson of scholarship committee;

Palm Valley School, Palm Springs, CA. Board of Trustees since 1981, including chairperson of Academic Affairs Committee since 1984, co-chairperson of ByLaws Committee in 1984 and chairperson of that committee since 1986, also served on scholarship, nominating and library committees; City of Palm Desert;

Rent Review Commission, member since 1987;

Palm Desert Community Presbyterian Church, member over ten years, chairperson of Adult Education Committee 1985 and 1987, member of Christian Education Department, also a representative on the *Committee on Representation of the Riverside Presbytery*, a regional organization of Presbyterian Churches;

Eisenhower Medical Center Auxiliary, Rancho Mirage, CA, volunteer since 1985;

Meals on Wheels, volunteer since 1985;

Palm Desert High School, Citizen Advisory Curriculum Committee, co-chairperson 1986; *Black Historical and Cultural Society*, member since 1985, including service on its Board;

Community Blood Bank, Rancho Mirage, CA, volunteer during past five years.

Optimist Club, judge for speech contest past eight years;

Turn - Off, Inc., drug and alcohol rehabilitation center for youth, volunteer activity since 1985;

Coachella Valley Courier, excellence of service award for outstanding community service, 1989.

48. Ms. Wade-Maltais spent 1964 in London, England, on a grant from the government of Jamaica, studying television production at the Center of Educational Television and studying audio-visual aids at the Institute of Education, University of London, England. From 1964-1966, she worked part-time for the Jamaica Broadcasting Corporation. She hosted a one-hour radio program, *Landscape*, which was broadcast on weekdays. From 1964-1966, she also served as co-host for a television program, *Landscape*, a thirty-minute weekly broadcast featuring agricultural topics and interviews. She also was a production assistant for a monthly television drama series for the Jamaica Broadcasting Corporation, and was Director of Workshop for Television scriptwriters for the University of the West Indies in Jamaica. *Id.*

Diversification

49. Neither Sundial nor its putative General Partner has any ownership interest in any mass media of communication. Sundial Exhibit 1; Tr. 116.

50. Leonard E. Walk and Florence Z. Walk own a 2.6333% limited partnership interest in Wheeling Radio Co., licensee of Stations WBBD(AM) and WEGW(FM), Wheeling, West Virginia, and a one percent (1%) limited partnership interest in Nittany Broadcasting Company, licensee of Stations WMAJ(AM) and WBHV(FM), State College, Pennsylvania. Mr. Walk is a general partner with a fifty percent (50%) ownership interest in CW Partners, permittee of low power television stations W36AQ, West Palm Beach, Florida, and W31AY, Jupiter, Florida. As of the cut-off date of this proceeding, Mr. Walk was a Director of Sheridan Broadcasting Corporation (Sheridan), licensee of Stations WAMO(AM) and WAMO-FM, Pittsburgh, Pennsylvania and WUFO(AM), Amherst, New York. Mr. Walk resigned as a Director of Sheridan as of December 31, 1989. *Id.*

Auxiliary Power

51. Sundial will employ auxiliary power at its studio and transmitter site. Sundial Ex. 3, p. 4.

DANIEL P. MITCHELL

Ownership

52. Mitchell is a sole proprietorship. Mitchell Ex. 1 at 1.

Integration

53. In the event Mitchell's application is granted, Mitchell will work full time at the station at least 40 hours per week as its General Manager. In that capacity, Mitchell will supervise all station operations, including but not limited to the hiring and firing of personnel, program policies, sales, business practices, and engineering. Mitchell Ex. 1.

54. To effectuate his integration commitment, Mitchell will terminate his current employment as an agent for Scher-Voit, a commercial real estate brokerage company in Irvine, California. However, Mitchell will retain his position as 50 percent owner and Chairman of the Board of Continental Publishing, Inc., a California corporation which is the franchise distributor of *TRAVELHOST* magazine, a publication of TRAVELHOST, Inc. in Dallas, Texas. Mitchell Ex. 1.

55. Mitchell does not have and will not have any employment or consulting agreement with Continental Publishing, Inc. He currently spends approximately eight (8) hours per month meeting and consulting with the company president to review company operations. Tr. 489. Upon grant here, Mitchell will shift to conferences by telephone from Rancho Mirage at times hoped to be compatible with Mitchell's execution of his responsibilities as General Manager at the station. Mitchell hopes not to spend any more than 8 hours per month talking with the president about Continental Publishing, Inc. To the extent his responsibilities as General Manager require far in excess of 40 hours per week, Mitchell hopes to decrease, but not curtail altogether, the amount of time he spends discussing business with Continental's president. Mitchell Ex. 1, p. 2.

56. Mitchell has never resided in the proposed service area; he pledges to move to Rancho Mirage in the event his application is granted. He presented no evidence of any civic record.

57. Mitchell has had the following experience in broadcasting:

-- WNDU-TV, South Bend, Indiana (1957-61) (student producer, cameraman, and other assorted positions);

-- WLOF, Orlando, Florida (1963-64) (sales representative, on-air commercial producer);

-- WFTV, Orlando, Florida (1963-64) (independent producer of commercials);

-- KEZY AM/FM, Anaheim, California (1964-85) (sales representative, on-air commercial producer, general sales manager, president, director, minority stockholder, and, between 1967 to 1985, General Manager of both stations); and

-- KFWB, Los Angeles, California (1985) (general sales manager); terminated after one year. Tr. 501-02.

Diversification

58. As indicated above, Mitchell is the Board Chairman and 50 percent owner of Continental Publishing, Inc., which is the franchised distributor of *TRAVELHOST* magazine in Long Beach, California, Catalina Island, California, and Orange County, California (and the holder of the franchise to arrange for advertising (Tr. 494) and to distribute the magazine in Los Angeles, California).

59. The magazine is not available to the public at large but is made available to guests at motels, hotels, and other guest quarters. The magazine is published on a monthly basis by TRAVELHOST, Inc., a separate corporation in which Mitchell has no interest, and is designed to inform the visitor of local area restaurants and tourist attractions. The magazine does not contain any editorials or comment on public issues. The responsibility of Mitchell's Continental Publishing, Inc. is to secure local advertising, arrange for distribution at hotels, motels and other guest quarters, and arrange for the presentation of information on local restaurants and points of interest. The current circulation of the magazine is approximately 23,000 in Orange County, California, 5,000 in Long Beach, California and 5,000 in Catalina Island, California. The current timetable contemplates expansion of the magazine into Los Angeles at the beginning of 1991. Tr. 492-93. Continental Publishing, Inc. does not distribute the magazine to any location within the service area of Mitchell's proposed station, and neither Mitchell nor Continental Publishing, Inc. has any right to distribute the magazine at any location within the proposed service area. While there is no contractual bar to Mitchell or Continental soliciting or accepting advertising for this magazine from the Rancho Mirage service area, there are no existing plans to do so. Tr. 494; Mitchell Ex. 2.

Auxiliary Power

60. Mitchell will install auxiliary power at the studio and transmitter site to ensure continued operation in the event of any power outage.

ISABELLE DRAKE D/B/A DRAKE BROADCASTING

Ownership

61. Isabelle Drake (Drake) and her former husband, Jess Drake, filed an application as a partnership under the names of Drake Broadcasting. By amendment filed on July 10, 1990, Drake Broadcasting reported that Isabelle and Jesse Drake had been divorced and that Isabelle Drake would proceed with the application as a sole proprietorship. Drake Exhibit 1. Pursuant to the Presiding Judge's Order of August 10, 1990, FCC 90M-2473, Drake is entitled only to integration credit commensurate with her 66.6 percent interest in Drake Broadcasting prior to the B cut-off date. Tr. 470.

Integration

62. If Drake's application is granted, Isabelle Drake will work at least forty hours in a week as the General Manager of Drake's station. She will spread her time at the station over at least a Monday-Friday workweek. As General Manager, she will exercise general supervision and hold ultimate authority over all aspects of station management and operations Drake Exhibit 2. In the event of a grant of her application Ms. Drake will move to Rancho Mirage. Drake Exhibit 3.

63. From 1984 to 1987, Ms. Drake was the Assistant General Manager of KCAL(AM) in Redlands, California. She held the same position at KCAL-FM from 1984 to 1986. Her responsibilities included general supervision of station operations, including sales, personnel, accounts payable and receivable, and contact with auditors, the FCC and station attorneys. She continued those responsibilities on a part-time basis for KCAL(AM) during some portion of 1988-1989. *Id.* In 1990, ending in early September, she returned to work at KCAL(AM) and concentrated on sales. *Id.*, Tr. 478.

Diversification

64. Drake has no attributable media interests. Drake Exhibit 4, Tr. 477-479.

Auxiliary Power

65. Drake will install auxiliary generators at its studio and transmitter sites. Drake Exhibit 5.

ANNE K. WALLACE AND WILLIAM F. WALLACE

Ownership

66. The applicant, Anne K. and William F. Wallace, wife and husband, is a general partnership. Mrs. Wallace owns a 60% partnership interest; Mr. Wallace owns the other 40% interest. Mrs. Wallace is the managing partner. Wallace Exhibit 1. Under the Partnership Agreement, she will be vested with the exclusive right "to manage and conduct the partnership business." The Agreement further provides that Mr. Wallace "shall devote his entire time to the furtherance of the partnership business." Mitchell Exhibit 8, p. 1. As an owner and general partner, Mr. Wallace will be involved in matters of overall station policy with the other general partner. Wallace Exhibit 3, p. 3; Tr. 617.

Background

67. Mr. and Mrs. Wallace function as a husband and wife team. Between 1965 and 1981, Mr. Wallace was the sole stockholder of Rancho Broadcasting, Inc., licensee of standard radio station KAAP in Santa Paul, California. Wallace Exhibit 1; Tr. 588. In 1976, Mr. and Mrs. Wallace became the joint owners of KAAP-FM in Santa Paula. The two stations used the same studio and were jointly managed by them as a team. Tr. 520. Both Wallaces worked at the stations full time between 1965 and 1981, except that, between 1973 and 1981, Mr. Wallace spent approximately 3 to 4 months each year providing freelance consulting services to ABC-TV. Wallace Exhibit 2 at 1; Wallace Exhibit 3 at 1; Tr. 521-522, 597-598.

68. The Wallaces sold KAAP-AM/FM in 1981. Their intention was to move to the desert full time upon consummation of the sale and, to that end, they purchased a condominium in 1981 in Rancho Mirago. The desert climate at Rancho Mirago was a motivational factor because of Mr. Wallace's sinus condition. Tr. 543-44. However, the Wallaces encountered a variety of problems with the buyer of KAAP-AM/FM and the buyer's sucessors-in-interest which required the Wallaces to spend time at their previous residence in Somas, which is near Santa Paula. As a result of these continuing problems, the Wallaces did not move to Rancho Mirage full time as they had planned in 1981. Tr. 522-24, 597-99.

69. The Wallaces are currently converting the former studio location into a residence which they hope to rent or sell. In addition to overseeing the conversion, the Wallaces maintain 650 avocado trees on the five-acre site where the studio and AM tower were located. The Wallaces also maintain a rental property in Oxnard, California. Mr. Wallace currently spends two (2) to two and one half (2 1/2) days per week supervising the construction of the residence. When the construction and renovation are completed, Mr. Wallace intends to sell the Santa Paula property. Assuming the property is rented, Mr. Wallace estimates that the Santa Paula and Oxnard property would require him to spend at most one day a month dealing with these matters. Tr. 601-604.

70. Mr. Wallace decided to participate in the Rancho Mirage application because his wife felt strongly about pursuing the opportunity and he felt obligated to support her in the way she had supported him at an earlier stage of his broadcasting career. Then he got excited about it himself. Tr. 605-06, 643. Although Mr. Wallace enjoys his current life style and leisure activities, he is looking forward to the new challenge with anticipation. Tr. 606-07, 628-29, 643-644. Mr. Wallace, who is 66 years old, enjoys excellent health. Tr. 537. The Wallaces' partnership agreement contains a provision for "Retirement and dissolution". Clause 10(a) "Retirement" provides:

> Clause 10(a) "Retirement" provides: "Any partner shall have the right to retire from the partnership at the end of any month. Written notice of his intention to retire shall be served upon the other partner at the office of the partnership at lease 30 days before the end of the month."

Mitchell Exhibit 8. Clause 10(a) was in the boilerplate obtained from Mr. Wallace's CPA. The Wallaces entered into a partnership agreement on the advice of their counsel. Mr. Wallace has never previously been involved in a partnership. The provision was not intended to permit him to retire after the station went on the air and that is not his present intention. Tr. 645-646.

Integration

Anne K. Wallace

71. Anne K. Wallace will function as full-time (at least 40 hours per week) General Manager at the proposed station. Each department head will report to her. In addition to overseeing the entire broadcasting operation, particular attention will be given by her to the station's format as to content, balance, news and public service, and with policy matters. She will also have ultimate responsibility for station personnel, finances, and rates. Tr. 648-49.

72. The Wallaces' principal residence is in Somis, California, 180 miles from Rancho Mirage. Tr. 543, 631. They are registered to vote at the Somis address which also appears on their respective drivers licenses. Tr. 619-620. The Wallaces have resided in Rancho Mirage at least half-time since 1981. Wallace Exhibit 1; Tr. 541-542, 635-637. They propose to live there full-time if the Wallaces' application is granted. Wallace Exhibit 1.

73. Mrs. Wallace has been a member of the Desert Chapter of *Childhelp USA* since 1988. Prior to 1988 Mrs. Wallace attended fund-raising functions of this Desert Chapter. Tr. 513-514. She has worked on campaigns to raise money for the Childhelp home for abused children, located in Riverside County, which includes Rancho Mirage. Although the home itself is located just outside the proposed service area, it takes in abused children from Rancho Mirage. Tr. 516.

74. Mrs. Wallace worked and served as Chairman in Rancho Mirage to help raise funds for the 1985-1986 United Way of the Desert Campaign, which raises funds used to help, as an example, the Hospice of the Desert, Family YMCA & Youth Center, Family Services of Coachella Valley, Desert Blind and Handicapped, etc. Wallace Exhibit 2, p. 2.

75. Mrs. Wallace has over 20 years experience in network broadcasting, administration, and local radio station operation and management. From 1965 to 1981, Mrs. Wallace served as vice-president, secretary, treasurer and assistant general manager at KAAP-AM, Santa Paula, California. Mrs. Wallace was responsible for overseeing the overall day-to-day management of the station including, but not limited to, content, balance and tempo of musical

formats, programming, news, and public service. She exercised all the management functions since the General Manager was absent much of the time. Tr. 589. Mrs. Wallace consulted with and reported to William Wallace, her husband and General Manager of the station concerning station operations, major policy matters and matters related to sales. From 1976 to 1981, Mrs. Wallace functioned similarly with KAAP-FM, Santa Paula. She was, however, a 50 percent owner of KAAP-FM. Wallace Exhibit 2, p. 1.

76. From September 1952 to August 1955, Mrs. Wallace served Don Lee Broadcasting System, Inc. as Secretary to William Whitsett (retired), Legal Counsel, Los Angeles, California. Mrs. Wallace resigned to become a full-time homemaker. Wallace Exhibit 2, p. 1.

77. From February 1952 to June 1952, Mrs. Wallace was employed by CBS at its owned and operated station KNXT, Los Angeles, California as Secretary to Station Manager, Wilbur S. Edwards (Deceased). She resigned to be married (Wallace Exhibit 2, pp. 1-2).

78. Mrs. Wallace was employed by American Broadcasting Company, New York, New York from 1950 to 1952 as Secretary to Earnest L. Jahncke (Deceased), President of Radio Network. She resigned to move to California (Wallace Exhibit 2, p. 2.

William F. Wallace

79. Mr. Wallace will be the station's full-time (at least 40 hours per week) sales manager. Wallace Exhibit 3 at 2. Mr. Wallace anticipates that, in addition to himself, there will be one full-time sales person and one part-time sales person. Mr. Wallace testified he would make recommendations for hiring and firing of sales personnel to his wife. Tr. 610. On policy matters such as hiring and the station rate care for advertising, Mr. Wallace stated that "it would be a joint arrangement" with his wife, but that Mrs. Wallace would have the "ultimate decision" in the event of any disagreement. Tr. 60, 648-49.

80. Mr. Wallace intends to supervise the two sales people he anticipates being hired. He testified it is necessary for sales personnel to have a complete understanding of the qualifications and position of the station in the market. Tr. 613. Initially he will make sales presentations with these other sales personnel. Wallace Exhibit 3 at 2. This is part of managing the sales. He plans to spend 95 percent of his time presenting the station to the marketplace, selling time and managing the sales staff. Tr. 616, 649-52. This will involve an ongoing ascertainment of community needs because fulfilling the ascertainment needs and the community's needs gets him, and through him the station, involved with the community's business/agency leaders. Tr. 650-51.

81. Mr. Wallace will also serve as Chief Engineer of the station. Wallace Exhibit 3, p. 2. In that capacity, Mr. Wallace will be responsible for supervising the construction and technical operation of the proposed station. Mr. Wallace expects to spend a weekend day every other week reviewing the technical parameters of station operations. The Wallaces do not contemplate the hiring of any additional engineering personnel and a contract engineer will be employed, when necessary. Tr. 607-609; 619.

82. Mr. Wallace has the following broadcast experience:

1965 to 1981 involved in overall operation of station KAAP-AM (and KAAP-FM when constructed in 1976) including sales, engineering, and programming, on a part-time basis from November 1965 to November 1973. Mr. Wallace was in charge of construction KAAP-FM. As owner, Mr. Wallace was responsible for ascertainment of community needs, problems and interests. From mid 1973 to January 1981, he was involved full time in the above duties with the exception of 3-4 months each year when involved with ABC TV management on a free lance basis.

1972 to 1973 Coordinator of Live Television Studio Operations, Educational TV Station KCET, Los Angeles, California.

1965 to 1972 Technical Director, American Broadcasting Company, Hollywood, California.

1960 to 1965 Founder (Tr. 652) President, International Video Tape, Inc., Los Angeles, California, a company which was one of the Country's first mobile videotape studios. Mr. Wallace produced for telecasting by ABC virtually all the West Coast *Wide World of Sports* programs, and also West Coast location type productions for CBS, NBC and ABC (Tr. 653). Mr. Wallace personally managed the facilities and production of programs fed to and aired by the networks (Tr. 655-56). ABC, in the early years, had no mobile facilities, so Mr. Wallace's company created the remote productions (Tr. 656-57).

1950 to 1960 Technical Director, National Broadcasting Company, New York, New York and Hollywood, California. Received "EMMY" award for "An Evening With Fred Astaire" in 1959.

1948 to 1950 Technical Director, Westinghouse Radio & TV, Inc., WBZ, Boston, Massachusetts (Wallace Exhibit 3).

1946 to 1948 Program Operations Engineer and Transmitter Engineer, Massachusetts Broadcasting Corp., WCOP, Boston, Massachusetts.

1945 to 1946 Announcer, Chief Engineer and Sales, Northern Broadcasting Company, WLNH, Laconia, New Hampshire (Wallace Exhibit 3, p. 2).

Diversification

83. Mr. and Mrs. Wallace have no other media interests. Wallace Exhibits 2, 3; Official notice also taken of Integration and Diversification Statement filed March 5, 1990.

Auxiliary Power

84. The Wallaces propose to install auxiliary equipment at the studio and transmitter site to insure continued operation in the event of any power outage. Wallace Exhibit 4.

Comparative Coverage

85. The applicants propose to provide 1 mV/m service to the following areas and populations. Jt. Eng. Ex. 1, Figs 2 & 3; Tr. 33:

Applicant	Population (1980 Census)	Sq. Kilometers
RMR	118,100	1770
Paul	129,800	4280
Sundial	82,000	700
Mitchell	118,200	1730
Drake	120,300	1870
Wallace	118,600	1810

During daytime and nighttime hours, all of the areas to be served by the applicants' proposals receive at least five primary aural services. *Id.* p. 3.

CONCLUSIONS

Diversification

86. RMR warrants a substantial diversification demerit because of the varied and significant ownership interests which its principals have in other broadcast stations. In light of the conclusions, *infra*, with respect to Sundial, Walk's media interests must be considered and Sundial is assessed a very slight diversification demerit. Paul, Drake, and Wallaces have no attributable media interests.

87. Mitchell's ownership interest in Continental Publishing, Inc. (Continental), the franchised distributor of TRAVELHOST magazine in portions of Southern California, does not warrant a diversification demerit. The monthly magazine has no meaningful impact on the Commission's goal to diversify sources of news and opinion. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394, n. 4 (1965). The magazine is not available to the public at large. It is distributed only in hotels and motels. It does not include any editorials or comments on public issues and its sole purpose is to inform visitors of local area events and points of interest. TRAVELHOST is not therefore, a medium of mass communications for diversification purposes. Even assuming, *arguendo*, the magazine was deemed to be a medium of thought and opinion and available to the public at large, it would still have no impact on any diversification analysis. Continental currently distributes less than 35,000 copies of the magazine in California. Even if Mitchell's best hopes for the future are realized, Continental would distribute less than 65,000 copies, all of which would be totally outside the service area. The Commission has held that a monthly magazine with a far greater state wide circulation including some service areas circulation is not relevant for diversification purposes. *Caldwell Broadcasting Corp.*, 104 FCC 2d 438 (1986). *See* also *Achernar Broadcasting Company*, 5 FCC Rcd 6309, 6312 (Rev. Bd. 1990); *Barton Broadcasting Company*, 104 FCC 2d 785, 787-88 (Rev. Bd. 1986). Clearly, in light of the cited precedent, Mitchell's ownership interst in Continental is not relevant.

Integration

Quantitative

88. RMR does not seek integration credit. Drake is entitled to 66.6% credit. Mitchell, Paul and Wallace receive 100% credit. The principals of these applicants will hold recognized management positions and play a policy making role. No evidence has been adduced undermining their entitlement to 100% quantitative credit.

89. Wallace's opponents urge that Mr. Wallace's 40% interest should not be credited. It is argued that Mr. Wallace will not play a managerial role because Mrs. Wallace, as managing partner, has ultimate decision making authority. This argument is deserving of short shrift. The Commission awards credit to a principal performing a managerial role, such as sales manager. The fact that another principal has a more significant role, such as a general manager with ultimate responsibility over station affairs, does not eliminate or diminish entitlement to integration credit. *See Voce Intersectario Verdad America, Inc.*, 100 FCC 2d 1607, 1616-1617 (Rev. Bd. 1985). Mr. Wallace will serve as sales manager, a managerial position recognized by the *Policy Statement*. Moreover, Wallaces' opponents also overlook the fact that the Wallaces, as husband and wife, have participated as a team over the years in other broadcast stations and the record evidence establishes they will continue to do so with respect to the proposed station. Consistent with *Voce*, the Wallaces proposal will receive full credit. Also, it is argued that Mr. Wallace's proposal lacks permanence. Wallaces' opponents principally rely on the partnership agreement which provides that on 30 days notice, either partner has the right to retire from the partnership at the end of a given month. The contention is unpersuasive. Unlike other agreements which have been credited, the Wallaces agreement has no provision for a set term. The 30 day notice provision, contained in a boilerplace provided by the Wallaces' CPA, merely provides an orderly vehicle for ending the partnership, should future necessities so require. It is not indicative of either partner's present intent. Mr. Wallace has made clear that he has no present intention to retire assuming grant of the application. His unrebutted testimony makes clear he is ready, willing and able to fulfill his integration proposal. The Wallaces receive 100% integration credit.

90. Sundial receives no integration credit. The totality of record evidence demonstrates that Sundial is not a *bona fide* limited partnership. The inescapable conclusion reached from a reading of the record is that Walk, the principal limited partner, has been the dominating moving force behind the application and will continue to play the dominant role if Sundial's application is granted.

91. Sundial is the brainchild of Leonard Walk, an experienced broadcaster who apparently has substantial resources at his command. Tr. 141. Walk decided to form a group to file the application for the Rancho Mirage facility. Since he was familiar with the Commission's comparative criteria, Walk knew that the application's chances of success would be enhanced if the group were controlled by a local minority. However, Walk is not a minority and lives in Florida. Walk decided to seek out a local minority person to be the nominal head of his group. Through a friend, Walk secured the name of Phillip K. Smith, Jr., a local developer, and Smith recommended Wade-Maltais, another stranger, to become the general partner in the limited partnership Walk was forming. After a few conversations with Smith and Wade-Maltais, Walk decided that he was prepared to invest substantial sums in a partnership over which Wade-Maltais would purportedly have exclusive control. Walk's offer to associate with Wade-Maltais was made despite his knowledge that she had no money to contribute to the project. Walk made this decision allegedly to give Wade-Maltais exclusive control even though she had had no prior experience in managing any business, let alone a

broadcast station, and even though Walk had not talked with anyone other than Smith, a total stranger, about Wade-Maltais' competence or character. It is ironic that although Wade-Maltais had Walk thoroughly investigated, Walk conducted no investigation of his putative 20% general partner and General Manager. On these facts alone, Sundial's proposal must be rejected as totally incredible. *Poughkeepsie Broadcasting Limited*, 5 FCC Rcd 3374, 3376 (Rev. Bd. 1990; *Royce International Broadcasting*, 5 FCC Rcd 7063, 7065, n. 10 (1990).

92. Moreover, it seems clear that in every decision of significance, the limited partners were involved. In the first major crisis faced by the partnership, the location of the transmitter site, Dr. Maltais quickly turned to her limited partners for assistance. It was they, not she, who were able to locate the transmitter site which made the application possible. In this connection, following a call from Wade-Maltais, Wald flew from Florida to Rancho Mirage to find an acceptable site. After he, too, failed, Phillip Smith was enlisted; he found a site at a company which his firm formerly owned and obtained a reasonable assurance letter for Sundial. Wade-Maltais never had any contact with the site owner. Moreover, the applicant's attorneys, who have represented Walk since 1976, and who continue to do so in other ventures, drafted the limited partnership agreement.[6] These attorneys also prepared all financial estimates, and found the station's engineer. It was also counsel who contaced an equipment leasing company (with which Wade-Maltais was completely unfamiliar) to arrange for this service. Wade-Maltais never had anything to do with the leasing company and was unable to testify about what equipment was and was not included in the proposed leasing package.

93. Also, significantly, even after hearing designation, when questions were raised about Sundial's site, it was limited partner Smith, not Wade-Maltais, who was sent to resolve them. Again, Wade-Maltais was completely removed from the matter, although she lives and works nearby. Sundial claims that the utilization of Smith's services was necessary because "the Commission's rules required that the factual allegations in Sundial's opposition be supported by affidavits of people with personal knowledge of the facts." Sundial Findings at para. 75. True enough. But nothing in the Commission's rules prohibited Wade-Maltais from contacting the owners of the transmitter site -- whose names were readily obtainable from the 1987 letter of assurance which she received (Mitchell Exhibit 4) -- to clarify the matter and then completing an appropriate affidavit.

94. Further, Wade-Maltais has no financial stake in the applicant to justify her equity interest. She has forthrightly testified that she has no money to invest, has made no financial contribution and is not required to make any such contribution in the future. In addition, the common feature of all limited partnership agreements -- and one central to the Commission's treatment of limited partnerships -- is that the general partner is "personally liable for the partnership debts." *Minority Ownership*, '92 FCC 2d 849, 854 (1982). Wade-Maltais, however, unequivocally stated that she was not personally liable for the debts. Wade-Maltais' lack of financial responsibility is further confirmed by Section 21 of the partnership agreement. Under that section, Wade-Maltais is absolved from any liability to the partnership or limited partners for any "action or inaction" which she, as general partner, determines was taken in good faith (unless the action or inaction results in liability under the federal or state security laws). The terms of this section are sufficiently broad to encompass any activity or conduct, including creditor relationships with the partnership as well as torts committed by the general partner. Wade-Maltais' total lack of financial responsibility standing alone, casts serious doubt about the *bona fides* of Sundial's partnership agreement. *See Carta Corporation*, 5 FCC Rcd 3696, 3697 (Rev. Bd. 1990). Moroever, paragraph 9 of the agreement specifies that the $200,000 to be supplied by the limited partners for prosecution, construction and operational expenses are to be in the form of loans. However, the agreement does not specify terms for repayment or the security to be provided for the loans. Thus, the limited partners could exercise control of the partnership by demanding repayment of their loans at any time. In any event, where, as here, the general partner is wholly dependent for the partnership's financial viability on loans from the limited partners, and there are no formalized loan terms, there exists no basis to insure that the general partner will be in a position of control.

95. The sham nature of the Sundial proposal is further exposed by Section 6 of the partnership agreement. That section makes clear in unambiguous terms that the Walks, who collectively own 60% of the partnership interest, could dissolve the partnership at any time. The right to dissolve the partnership accords the limited partners, and especially the Walks, considerable leverage over any activity of the partnership or any decision which Wade-Maltais would contemplate. This provision, by itself, undermines any claim by Sundial that its limited partners are only passive investors who will remain insulated from any control over Sundial. *Doylan Forney*, 5 FCC Rcd 5423, 5424 (1990); see also *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1055-55 (Rev. Bd. 1986). The totality of the record evidence thus belies any claims that Wade-Maltais possesses and is capable of exercising control over Sundial. Sundial's partnership is a sham unworthy of integration credit. *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7953 (Rev. Bd. 1989); *Royce, supra*. Even if Sundial is found deserving of some integration credit, that credit cannot exceed 20% (the amount equal to the general partner's equity interest) in light of the limited partners' active participation in the partnership's affairs. *See Signal Ministries, Inc.*, 104 FCC 2d 1487 (Rev. Bd. 1986).

Qualitative

96. To reiterate, RMR and Sundial receive no integration credit and Drake receives 66.6% quantitative credit. Drake's credit is too far below 100% to merit comparison on a qualitative basis. *Miracle Strip Communications, Corp.*, 4 FCC Rcd 5064, 5066 (1989). The choice is among Wallaces, Paul and Mitchell.

97. Mitchell is the weakest of the three remaining applicants. His only enhancement are his proposal to move to the service area and his broadcast experience. As between the Wallaces and Paul, Wallaces' enhancements are superior. Wallaces' half time local residence since 1981 is more significant than Paul's brief and intermittent service area residence after the filing of his application. In addition, the Wallaces' civic activities[8] outweigh those of Paul. The Wallaces clearly enjoy an advantage under the local residence criterion. Also, the Wallaces are entitled to 60% female enhancement. With respect to broadcast experience, the only remaining area of comparison, Wallaces'

extensive broadcast management experience is clearly superior to Paul's experience as an engineer or as a consultant in the construction of stations. Therefore, the Wallaces receive an overall integration preference.

Auxiliary Power

98. Since all the applicants propose auxiliary power, none enjoy an advantage under this criteria.

Comparative Coverage

99. The areas served by the applicants already receive five or more fulltime aural services. However, Paul's overall service advantage merits a very slight preference over RMR, Mitchell, Drake and Wallaces. *See Ronald Sorensen*, 5 FCC Rcd 3144, 3147 (Rev. Bd. 1990), *rev'd on other grounds*, FCC 91-93, released April 9, 1991. Paul, RMR, Mitchell, Drake and Wallaces are entitled to a slight preference over Sundial in terms of overall coverage.

Comparative Summary

100. The Wallaces are entitled to a preference for integration since they enjoy superiority in the factors of local residence, gender (60% female) and the less important broadcast experience factor. The Wallaces' integration preference outweighs the very slight preference awarded to Paul for superior coverage. Wallaces' application is, therefore, granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[9] the application of Anne K. Wallace and William F. Wallace for a new FM station on Channel 258A in Rancho Mirage, California IS GRANTED; and the applications of Wayne G. Mulligan, Richard D. Buckley, Jr., and Richard S. Korsen d/b/a Rancho Mirage Radio, A General Partnership,[10] Hugh R. Paul, Sundial Radio Broadcasters, A California Limited Partnership, Daniel P. Mitchell, and Isabelle Drake d/b/a Drake Broadcasting ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The application of Desert Sun Radio Limited was dismissed by *Order*, 90M-3037, released September 26, 1990. The application of G. Dale Cowle was dismissed by *Hearing Designation Order*, DA 90-16, 5 FCC Rcd 721 (ASD 1990). The application of Pike Family Broadcasting, Inc. was dismissed by the FM Branch on May 9, 1987, reconsideration was denied by the *HDO*, and an *Application for Review* remains *sub judice*.

[2] While Mulligan has the title "Vice President-Engineering," this is an employment title. He is not an official corporate officer of either Buckley Broadcasting Corporation or Buckley Broadcasting Corporation of Maine.

[3] In 1987-1989 period, Paul also made a number of trips to Hawaii of a few days duration in connection with the construction of the station. Tr. 113.

[4] At his deposition, Walk testified that he had told Smith about his interest in forming a limited partnership. Although he admitted at the hearing that that testimony was correct, Walk also stated that, after further thought, he was not sure whether he mentioned a limited partnership to Smith in that first conversation. Tr. 393.

[5] *See supra* at §27, n 4.

[6] The limited partnership agreement is virtually identical to the one previously prepared by the same counsel for another applicant (Sheridan Broadcasting Corporation) for whom Walk was providing consulting services. In this connection, the applicant in that proceeding was also determined to be a "sham." *See Weyburn Broadcasting Limited Partnership*, 4 FCC Rcd 5310 (I.D. 1989), *affirmed* FCC 91R-17, released February 27, 1991 (Rev. Bd.).

[7] Assuming Sundial receive 20% integration credit for Wade-Maltais' participation, Sundial's proposal would be enhanced by Wade-Maltais' minority, female, local residence and civic participation and very slight broadcast experience enhancement credit.

[8] Local residence and civic activities is a single qualitative factor. *See Ronald Sorenson*, FCC 91-93, released April 9, 1991.

[9] In the event exceptions are not filed within 30 days after the release of this initial decision, and the Commission does not review the case on its own motion, this initial decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[10] On April 26, 1991, RMR filed a "Statement For The Record" advising that Richard S. Korsen, RMR partner, died on March 31, 1991. Since RMR does not propose integration, Mr. Korsen's death does not affect the comparative analysis.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-135

In the Matter of

Amendment of Section 73.202(b), RM-7697
Table of Allotments,
FM Broadcast Stations.
(Boonville and Columbia,
Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 29, 1991; Released: May 10, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Big Country of Missouri, Inc. ("petitioner"), requesting the allotment of Channel 230A to Boonville, Missouri, as that community's second FM broadcast service. Petitioner provided an engineering study in support of the proposal and indicated it would apply for the channel, if allotted.

2. Channel 230A can be allotted to Boonville, Missouri, in compliance with the Commission's minimum distance separation requirements at a site 11.5 kilometers (7.2 miles) east of the community.[1] The site restriction will prevent a short spacing to Channel 231C, Station KFKF-FM, Kansas City, Kansas. To accommodate the new channel at Boonville, petitioner has proposed the substitution of Channel 272A for Channel 230A at Columbia, Missouri. Three applications are on file for the channel at Columbia.[2] Channel 272A can be allotted to Columbia in compliance with Section 73.207 of the Commission's Rules at city reference coordinates.[3] The applicants for Channel 230A at Columbia would be permitted to specify the new Class A channel at a non-short spaced site and retain cut-off protection, since the channels are of an equivalent class.

3. In view of the fact that Boonville could receive a second FM broadcast service, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Boonville, Missouri	257C2	230A, 257C2
Columbia, Missouri	230A, 244A, 252C2, 268C2	244A, 252C2, 268C2, 272A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 1, 1991,** and reply comments on or before **July 16, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frederick A. Polner
Richard K. Olson, Jr.
Rothman Gordon Foreman &
Groudine, P.C.
Third Floor, Grant Building
Pittsburgh, Pennsylvania 15219
(Counsel for the petitioner)

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the following:

Cooke-Donze
Broadcasting, Inc.
41 Boverie Drive
Genevieve, MO 63670
(BPH-880531MO)

Nicdem Media, Inc.
2165 East Raynell
Springfield, MO 65804
(BPH-880531MZ)

Mid-State Partnership
8229 Maryland
St. Louis, MO 63105
(BPH-880615ME)

Columbia FM, Inc.
Station KARO
503 Old 63 North
Columbia, MO 65201
(licensee of Station KARO)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 230A at Boonville are 38-58-56 and 92-36-09.

[2] The applications for Channel 230A at Columbia were designated for hearing on June 4, 1990: Cooke-Donze Broadcasting, Inc. (BPH-880531MO); Nicdem Media, Inc. (BPH-880531MZ); and Mid-State Partnership (BPH-880615ME).

[3] The coordinates for Channel 272A at Columbia are 38-57-24 and 92-19-48. A Commission engineering analysis indicates that Channel 272A could be allotted to Columbia at all of the sites selected by the applicants for Channel 230A. Although Channel 272A is short spaced to Channel 269A, Station KARO, Columbia, Missouri, we note that pursuant to Docket 86-103, 4 FCC Rcd 5645 (1989), the FM Table of Allotments was amended, effective September 5, 1989, to reflect Channel 268C2 in lieu of Channel 269A. Columbia FM, Inc., the licensee of Station KARO, filed an application for Channel 268C2 (File No. BPH-890921ID). As a result, Station KARO is no longer entitled to protection for Channel 269A at Columbia. *See Plainview, Texas*, 4 FCC Rcd 8788 (1989). We will serve Station KARO with a copy of this *Notice*. Columbia FM, Inc. has filed a counterproposal in MM Docket 89-558 requesting the substitution of Channel 268C1 for Channel 268C2 in Columbia, MO. *See* 4 FCC Rcd 8484 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-609

In the Matter of

Amendment of Section 73.202(b), RM-7542
Table of Allotments,
FM Broadcast Stations.
(Nephi, Utah)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 29, 1991; Released: May 10, 1991

By the Chief, Allocations Branch:

1. At the request of Charles D. Hall ("petitioner"), permittee of Station KCDH(FM), Channel 224A, Nephi, Utah, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7491 (1990), proposing the substitution of Channel 280C for Channel 224A at Nephi and modification of his authorization for Station KCDH(FM) to specify the non-adjacent, higher powered channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 280C for Channel 224A at Nephi, Utah, since it would provide the community with a wide coverage area FM service. Channel 280C can be allotted to Nephi in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] As proposed, we will modify the petitioner's authorization for Station KCDH(FM) to specify operation on Channel 280C in lieu of its present Channel 224A pursuant to Commission rule 1.420(g). We will not allot Channel 260C to Nephi, which was proposed as an additional equivalent class channel for use by other interested parties, since no interest in use of the channel was expressed.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 24, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Nephi, Utah	280C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit (BPH-870331PR) for Charles D. Hall for Station KCDH(FM), Nephi, Utah, IS MODIFIED to specify operation on Channel 280C, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 280C at Nephi are North Latitude 39-42-36 and West Longitude 111-50-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-134

In the Matter of

Amendment of Section 73.606(b), RM-7708
Table of Allotments,
TV Broadcast Stations.
(Wailuku, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 29, 1991; Released: May 10, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of KFVE Joint Venture ("petitioner"), licensee of Station KFVE-TV, Honolulu, Hawaii, seeking to dereserve Channel *27 at Wailuku, Hawaii, and reallot Channel 27 at Wailuka, Hawaii, as a commercial operation. Petitioner states its intention to apply for the channel, if allotted.

2. Wailuku (population 10,260), seat of Maui County (population 70,847), is located on the Island of Maui approximately 150 kilometers (92 miles) east of Honolulu.[1] In support of its proposal, petitioner states that Wailuku has a noncommercial educational station on Channel 10 and an additional unused reserved Channel *33. Petitioner argues that Channel *27 has not been used for 25 years.

3. A Commission staff engineering analysis has determined that television Channel 39 can be allotted to Wailuku at city reference coordinates in compliance with the Commission's minimum distance separation requirements.[2] We believe the allotment of an additional channel to Wailuku better serves the public interest than the dereservation of a noncommercial educational allotment. Although the Commission has imposed a freeze on television allotments in certain areas, Wailuku is not in one of the affected areas.

4. We believe the public interest would be served by proposing the allotment of television Channel 39 to Wailuku, Hawaii, as an additional television service for that community. Accordingly, we seek comments on the proposal to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Wailuku, Hawaii	3, 7, *10, 12, 15, 21, *27, *33	3, 7, *10, 12, 15 21, *27, *33, 39

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be assigned.

6. Interested parties may file comments on or before **July 1, 1991,** and reply comments on or before **July 16, 1991** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robyn G. Nietert
Eric S. Kravetz
Brown, Finn & Nietert, Chartered
1920 N Street, N.W., Suite 660
Washington, D.C. 20036
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures taken from 1980 US Census.

[2] The coordinates for Channel 39 at Wailuku are North Latitude 20-53-24 and West Longitude 156-30-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-133

In the Matter of

Amendment of Section 73.202(b), RM-(7710)
Table of Allotments,
FM Broadcast Stations.
(Wickenburg, Arizona)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 29, 1991; Released: May 10, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Circle S Broadcasting Co., Inc. ("petitioner"), requesting the allotment of Channel 229A to Wickenburg, Arizona, as that community's second local FM service. Petitioner stated its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 229A to Wickenburg since it could provide a second local FM service to the community. Channel 229A can be allotted to Wickenburg consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, with a site restriction 7.8 kilometers (4.9 miles) southwest of the community,[1] to avoid a short-spacing to Station KDKB(FM), Channel 227C, Mesa, Arizona,[2] and Station KMGN(FM), Channel 230C, Flagstaff, Arizona.[3] Additionally, since Wickenburg is located within 320 kilometers (199 miles) of the United States - Mexican border, the Commission must seek concurrence of the Mexican Government in the proposal.

3. Accordingly, we believe it is appropriate to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Wickenburg, Arizona	287C2	229A, 287C1[4]

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 1, 1991,** and reply comments on or before **July 16, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Circle S Broadcasting Co., Inc.
Attn.: Harold R. Shumway, President
P.O. Drawer Y
Wickenburg, AZ 85358

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 229A are 33-55-53 and 112-48-12.

[2] Coordinates at the licensed site for Station KDKB(FM) are 33-20-04 and 112-03-36.

[3] Coordinates at the licensed site for Station KMGN(FM) are 34-58-08 and 111-30-28.

[4] Channel 287C1 has been proposed as a substitute for Channel 287C2 at Wickenburg in MM Docket No. 90-468. *See* 5 FCC Rcd 6271 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Operating Companies'
Permanent Cost Allocation Manual
for the Separation of Regulated
and Nonregulated Costs

ORDER

Adopted: April 19, 1991; Released: May 13, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 30, 1988, February 28, 1989, June 30, 1989, and September 29, 1989, Bell Atlantic filed revisions to its permanent cost allocation manual for the allocation of regulated and nonregulated costs. In these revisions, Bell Atlantic has made numerous changes to its cost categories and allocation methods. The District of Columbia Public Service Commission (DCPSC) filed comments on Bell Atlantic's revisions which focus on changes in the allocation of nonproductive time and revisions to the following accounts: 5050-Customer Premises Revenue, 5301-Uncollectible Revenue-Telecommunications, 5302-Uncollectible Revenue-Other, 2351-Public Telephone Terminal Equipment, 1220-Inventories, and 6711-Executive Expense. Bell Atlantic replied to each of DCPSC's comments. We have reviewed Bell Atlantic's revisions and the issues addressed by the DCPSC and will accept some of Bell Atlantic's changes, while also requiring it to make certain revisions to its cost allocation manual.

2. In the *Joint Cost Order* [1], the Commission required Tier 1 carriers to file manuals describing the methods they use to separate the costs of regulated telecommunications services from the costs of nonregulated activities. Bell Atlantic filed its original cost allocation manual on August 10, 1987. The manual describes Bell Atlantic's nonregulated activities, lists the activities it proposes to treat as incidental, and provides information on its affiliate transactions, employee time reporting procedures, and cost apportionment methods. Bell Atlantic filed revisions pursuant to two Bureau orders and has subsequently filed routine quarterly updates.[2]

II. ANALYSIS OF BELL ATLANTIC'S REVISIONS AND DCPSC COMMENTS

A. Accounts 5050-Customer Premises Revenue, 5301-Uncollectible Revenue-Telecommunications and 5302-Uncollectible Revenue-Other

3. In its December 30, 1988, revisions Bell Atlantic eliminated the nonregulated cost pools in Accounts 5050-Customer Premises Revenue, 5301-Uncollectible Revenue-Telecommunications and 5302-Uncollectible Revenue-Other. Formerly, these accounts contained two cost pools, one directly assigned to regulated activities and the other directly assigned to nonregulated activities. The DCPSC argues that it is unclear whether these accounts contain only regulated revenues and that the manual should be revised to state that nonregulated revenues are not included if that is the case. If the accounts contain nonregulated revenues, DCPSC believes that revenues should be allocated as in the past. In its reply, Bell Atlantic states that its revisions removed nonregulated revenues from those regulated accounts in compliance with the Commission's requirement to use Account 5280 for nonregulated revenues. [3]

4. In its February 28, 1989, revisions to Accounts 5301 and 5302, Bell Atlantic changed the allocation methodology to include nonregulated uncollectibles. Accounts 5301 and 5302 are allocated to regulated and nonregulated activities based on relative telecommunications revenue and relative non-telecommunications revenue, respectively. DCPSC states that the use of relative revenues as an allocator assumes that the ratio of uncollectibles to total revenues is the same for regulated and nonregulated operations. DCPSC argues that the percentage of revenues that are uncollectible should differ between regulated and nonregulated activities because of the different customer mix and because termination of basic telephone service is often not permitted where bills related to nonregulated services are not paid. DCPSC believes that Bell Atlantic should continue to directly assign uncollectible revenue. In its reply, Bell Atlantic responds that its changes in the allocation of uncollectible revenues were made in response to a Bureau Order requiring it to clarify that uncollectible telecommunications revenue and other uncollectible revenue are apportioned in proportion to relative telecommunications revenue and relative non-telecommunications revenue, respectively.

5. Bell Atlantic's revisions to accounts 5050, 5301 and 5302 are in compliance with Commission and Bureau Orders. In the *Further Reconsideration Order*, the Commission established Account 5280, Nonregulated Operating Revenue, to record nonregulated revenues derived from activities which share assets or resources with regulated activities. In compliance with that Order, Bell Atlantic, in its December 1988 revisions, removed nonregulated cost pools from several revenue accounts, including account 5050. In the *Compliance Order*, the Bureau directed Bell Atlantic to clarify that it apportions Accounts 5301 and 5302 on the basis of relative telecommunications revenue and relative non-telecommunications revenue, respectively. We believe that apportionment based upon relative revenues is more appropriate than direct assignment for uncollectible revenues because uncollectible revenues are recorded based upon estimates of future uncollectible accounts. Therefore, uncollectible revenues do not relate to specific uncollectible accounts. Instead, they reflect general trends based upon past experience. Since uncollectible revenues do not relate to specific uncollectible accounts at the time they are recorded, we believe it is not possible to directly assign uncollectible revenues to regulated and nonregulated operations. Accordingly, we accept Bell Atlantic's December 1988, and February 1989, revisions to these accounts.

B. Nonproductive Time

6. In its February 28, 1989, revisions Bell Atlantic added a nonproductive time cost pool to several expense accounts.[4] These nonproductive time cost pools are allocated to regulated and nonregulated activities based upon productive wages and salaries. DCPSC states that it is unclear whether nonproductive time will be allocated based on productive wages and salaries for each expense category or for the company as a whole. DCPSC argues that it is not appropriate that the costs of one function be allocated based on the nonproductive time of other functions and that Bell Atlantic should clarify that nonproductive time is allocated by a separate allocator for each expense account.

7. Bell Atlantic replies that its revisions only modified the allocation of nonproductive time of those employees who use exception time reporting. Bell Atlantic states that these employees can use exception time reporting for their productive time, but not their nonproductive time. According to Bell Atlantic, the nonproductive time must be segregated into a separate cost pool within the accounts to which it is normally assigned and then allocated in the same proportion as productive time. Bell Atlantic explains that productive time is reported on an exception basis to a number of different accounts; and, therefore, nonproductive time in any given account cannot be apportioned pursuant to an allocator which is based on any single account. Bell Atlantic explains further that the productive time in all accounts must be considered in developing the allocation factor for nonproductive time. Bell Atlantic clarifies that nonproductive time is allocated based on productive wages and salaries for the company as a whole.

8. We believe that Bell Atlantic's use of total company wages and salaries as the allocator for nonproductive time of employees who use exception time reporting is inappropriate. Bell Atlantic accumulates nonproductive time for these employees in separate cost pools in several expense accounts. However, instead of allocating these pools based upon the productive wages and salaries contained in these accounts, it uses total company productive wages and salaries to allocate nonproductive time. We believe that the nonproductive time of exception time reporting employees accumulated in any given account should be allocated in the same proportion as the productive wages and salaries in that account. Therefore, we require that Bell Atlantic revise its allocator for its nonproductive time cost pools from total company productive wages and salaries to account specific productive wages and salaries.

C. Account 2351-Public Telephone Terminal Equipment

9. On June 30, 1989, Bell Atlantic added a "Coin operated storage equipment" cost pool in Account 2351-Public Telephone Terminal Equipment. Prior to this revision, all investment in Account 2351 was directly assigned to regulated operations. The "Coin operated storage equipment" cost pool is apportioned to regulated and nonregulated based on the relative revenues in accounts 5010-Public Telephone Revenue and 5280-Nonregulated Operating Revenue. DCPSC believes that in addition to allocating these costs, Bell Atlantic should also allocate to nonregulated activities one-half of the market price of the hardened case enclosing the coin set. DCPSC states that a major reason for enclosing the coin set in a hardened case is to protect against theft of the coins, including coins deposited for Coin Messaging Service.[5] Bell Atlantic replies that there is no basis for the DCPSC's suggestion that one-half of the market price of the hardened case should be allocated to nonregulated activities and that the percentage is arbitrary. Bell Atlantic states that the entire coin set costs $490, that the cost of the hardened case cannot be separately identified and that the costs would be a small part of the total cost.

10. In an order released June 2, 1989,[6] the Bureau required Bell Atlantic to make certain changes to its cost manual to reflect the use of the coin storage equipment portion of the public telephone terminal equipment as repositories for nonregulated revenues derived from the provision of coin messaging service. In compliance with that order, Bell Atlantic added the coin operated storage equipment cost pool in Account 2351 as part of its June 30, 1989 revisions. In that order we did not discuss the allocation of the hardened case which encloses the public telephone and the coin set. However, DCPSC has now raised the issue that the hardened case protects both the regulated and nonregulated revenue from theft and, therefore, a portion of it should be allocated to nonregulated activities. We agree with DCPSC that some portion of the cost of the hardened case should be allocated to nonregulated activities. However, we disagree that the hardened case should be equally apportioned to regulated and nonregulated operations.

11. We believe a more cost causative approach for allocating this cost would be the relative regulated/nonregulated revenues which are also used to allocate the costs of the coin storage equipment cost pool. Although Bell Atlantic argues that the cost of the hardened case cannot be separately identified, it does state that the cost of the entire set is $490. We believe that Bell Atlantic has the expertise to reasonably approximate the cost of the hardened case and thereby allocate this cost between its regulated and nonregulated operations. We instruct Bell Atlantic to submit as part of its next quarterly revisions an attachment to its cover letter explaining the method it has devised to identify these costs and to revise Account 2351 to reflect the allocation of the hardened case enclosing the coin storage equipment.

D. Account 1220-Inventories

12. On September 29, 1989, Bell Atlantic revised the names of several cost pools in Account 1220-Inventories, and it revised the allocator of one cost pool. Although DCPSC did not question Bell Atlantic's revisions, it did question the allocation methodology of three cost pools in Account 1220: Equipment Held for Sale-Furniture and Office Equipment Material; Equipment Held for Sale-Other Material; and, Equipment Held for Sale-Regulated. In its reply Bell Atlantic argues that it changed only the title, not the apportionment basis, of the cost pools and therefore DCPSC comments are untimely. However, it addresses the issues raised by DCPSC.

13. DCPSC claims that, in principle, inventory which is held for sale should be allocated in the same manner as when it is in service. DCPSC notes that the wages and salaries allocator for the "Equipment Held for Sale-Furniture and Office Equipment Material" cost pool in Account 1220 excludes the wages and salaries of central office switching employees, while the allocator for the Furniture and Office Equipment investment accounts includes the wages and salaries of central office switching employees. Bell Atlantic replies that the Account 1220

cost pool excludes the wages of these employees because the furniture and office equipment used by these employees is almost always old furniture which has been discarded by other employees and will not be held for sale to anyone else.

14. DCPSC states that the "Equipment Held for Sale - Other Material" cost pool presumably refers to material other than that contained in previously listed cost pools. DCPSC claims that it is unclear why the allocation basis for this pool excludes wages and salaries related to cable and wire facilities and information origination/termination craft employees since the wages of these employees do not appear to be encompassed by the categories previously listed. In its reply, Bell Atlantic states that this pool is no longer used by any of its telephone companies and it proposes to delete this pool entirely.[7]

15. DCPSC submits that the "Equipment Held for Sale-Regulated" cost pool is directly assigned but it appears that much of the equipment held for sale in other categories is also used to provide regulated services. DCPSC submits that presumably the directly assigned equipment relates to categories other than those allocated but that this presumption is not stated, resulting in ambiguity. Bell Atlantic states that DCPSC's presumption is correct. Bell Atlantic submits that it does not have to spell this out in its manual because the Commission's rules require direct assignment whenever possible so that only the remaining costs are allocated.

16. We believe that Bell Atlantic's explanation for the exclusion of wages and salaries of central office switching employees from the allocation factor for the "Equipment Held for Sale-Furniture and Office Equipment Material" cost pool is appropriate and we accept its allocation methodology. As proposed in its reply comments, Bell Atlantic deleted the "Equipment Held for Sale-Other Material" cost pool in its December 29, 1989, revisions. With regard to the DCPSC comments on the "Equipment Held for Sale-Regulated" cost pool, we fail to see the ambiguity to which DCPSC refers. Instead, we agree with Bell Atlantic that it does not have to spell out that this cost pool relates to categories other than those allocated in other cost pools.

E. Account 6711-Executive Expense

17. In its September 29, 1989, filing Bell Atlantic revised the allocation factors for the "Engineering and Plant Operations" and the "Corporate Operations" cost pools in Account 6711-Executive Expense. Formerly the "Engineering and Plant Operations" cost pool was allocated to regulated and nonregulated operations based on directly assignable and attributable costs in a number of the plant related expense accounts.[8] These revisions eliminated the following accounts from the allocation factor: 6112, 6113, 6115, 6120, 6122, 6124, 6512 and 6534. Formerly the "Corporate Operations" cost pool was allocated to regulated and nonregulated operations based on directly assigned and attributable costs in a number of the corporate operations expense accounts.[9] These revisions eliminated Accounts 6723-Human Resources and 6726-Procurement from the allocation factor. DCPSC believes Bell Atlantic should explain why Account 6122-Furniture and Artworks is excluded while Account 6123-Office Equipment Expense is included in the regulated/nonregulated apportionment basis of the "Engineering and Plant Operations" cost pool and why Accounts 6723 and 6726 are excluded from the apportionment basis of the "Corporate Operations" cost pool. Bell Atlantic replies that certain accounts are excluded from the apportionment factors in cost pools of Account 6711 because those accounts are allocated, at least indirectly, on the basis of costs in Account 6711. Bell Atlantic submits that it excluded Accounts 6122, 6723, and 6726 from the apportionment factors used to allocate costs in Account 6711 to avoid a "circular loop"[10] in which allocations could not be accomplished.

18. We find Bell Atlantic's explanation for the exclusion of Accounts 6122, 6723 and 6726 from the apportionment basis of the "Engineering and Plant Operations" and "Corporate Operations" cost pools to be appropriate and we accept these revisions to Account 6711. Accounts 6122, 6723 and 6726 have no directly assignable costs and use of the attributable costs in these accounts as part of the apportionment factor of the cost pools in Account 6711 would create circularity and prevent appropriate regulated/nonregulated allocation. Account 6123, however, includes directly assigned costs which can be included in the apportionment factor of the "Engineering and Plant Operations" cost pool without producing a circular loop.

III. ORDERING CLAUSE

19. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), That the revisions filed by Bell Atlantic ARE ACCEPTED subject to the conditions noted in this Order.

20. IT IS FURTHER ORDERED, That Bell Atlantic shall submit further revisions, as specified in this Order, in its next quarterly Cost Allocation Manual filing.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, Report and Order, CC Docket 86-111, 2 FCC Rcd 1298 (*Joint Cost Order*), recon., 2 FCC Rcd 6283 (1987) (*Reconsideration Order*), *further recon.*, 3 FCC Rcd 6701 (1988) (*Further Reconsideration Order*), *aff'd sub nom.*, Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990).

[2] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109 (Com. Car. Bur. 1988) (*Bell Atlantic Order*) and 4 FCC Rcd 496 (Com. Car. Bur. 1989) (*Compliance Order*).

[3] *Further Reconsideration Order*, 3 FCC Rcd at 6702.

[4] Nonproductive time cost pools were added to the following USOA accounts: 6112-Motor Vehicle Expense, 6113-Aircraft Expense, 6351-Public Telephone Terminal Equipment Expense, 6512-Provisioning Expense, 6532-Network Administration Expense, 6534-Plant Operations Administration Expense, 6535-Engineering Expense, 6611-Product Management, 6612-Sales, 6613-Product Advertising, 6621-Call Completion Services,

6622-Number Services, 6623-Customer Services, 6711-Executive, 6712-Planning, 6721-Accounting and Finance, 6722-External Relations, 6723-Human Resources, 6724-Information Management, 6725-Legal, 6726-Procurement, 6727-Research and Development, and 6728-Other General and Administrative.

[5] Coin Messaging Service is a nonregulated activity which allows a pay telephone user to leave a message for the called party if the called telephone is busy or is not answered after a set number of rings.

[6] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, Bell Atlantic Telephone Companies' Petition for Waiver of CEI Requirements to Perform Technical Trials of Coin Messaging Service, 4 FCC Rcd 4631 (Com. Car. Bur. 1989).

[7] Bell Atlantic deleted this cost pool in its December 29, 1989, revisions.

[8] These accounts are as follows: 6112-Motor Vehicles Expense, 6113-Aircraft Expense, 6115-Garage Work Equipment Expense, 6120-General Support Expense, 6122-Furniture and Artworks Expense, 6123-Office Equipment Expense, 6124-General Purpose Computer Expense, 6211-Analog Electronic Expense, 6212-Digital Electronic Expense, 6215-Electro-Mechanical Expense, 6220-Operator Systems Expense, 6230-Central Office Transmission Expense, 6231-Radio Systems Expense, 6232-Circuit Equipment Expense, 6341-Large Private Branch Exchange Expense, 6351-Public Telephone Terminal Equipment Expense, 6362-Other Terminal Equipment Expense, 6411-Pole Expense, 6422-Underground Cable Expense, 6423-Buried Cable Expense, 6424-Submarine Cable Expense, 6426-Intrabuilding Network Cable Expense, 6431-Aerial Wire Expense, 6441-Conduit Systems Expense, 6512-Provisioning Expense, 6532-Network Administration Expense, 6533-Testing Expense, 6534-Plant Operations Administration Expense and 6535-Engineering Expense.

[9] These accounts are as follows: 6712-Planning, 6720-General and Administrative, 6721 Accounting and Finance, 6722 External Relations, 6723-Human Resources, 6724-Information Management, 6725-Legal, 6726-Procurement, 6727-Research and Development and 6728-Other General and Administrative.

[10] A "circular loop" exists when an allocator used to apportion an account is based either directly or indirectly upon some element in the account being allocated. For example, Account 6122 was part of an allocation factor used to apportion the "Engineering and Plant Operations" cost pool in Account 6711, Executive Expense. However, Account 6122 is allocated based on wages and salaries which include executive salaries in Account 6711. Since Account 6711 costs are included in the allocator for Account 6122, one would need to apportion Account 6711 before apportioning Account 6122. Similarly, since Account 6122 is allocated based on Account 6711 costs, one would need to apportion Account 6122 before apportioning Account 6711. In this situation an allocation cannot be accomplished.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-90-178(A)

Application for authority to acquire and operate facilities for direct service between the U.S. and India.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 26, 1991; Released: May 10, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on September 6, 1990, and amended December 7, 1990 and supplemented April 22, 1991, by US Sprint Communications Company Limited Partnership (US Sprint), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and India. The application and amendment were placed on public notice on September 12, 1990 and December 19, 1990, respectively. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and India by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-178(A) IS GRANTED and US Sprint is authorized to:

a. lease from Mercury Communications Ltd. (MCL) a one-half interest in and operate connecting facilities between MCL's PTAT-1 cable head in Brean, England and MCL's satellite earth station in Bracknell, England;

b. lease and operate one IDR (30 bearer circuits) in the Bracknell, England earth station;

c. lease from U.K. INTELSAT Signatory and operate one IDR circuit between the Bracknell, England earth station and an appropriate satellite over the Indian Ocean, connecting with a similar circuit between the satellite and an earth station in India, furnished by US Sprint's correspondent in India, Videsh, Sanchar Nigan, Ltd. (VSN);

d. utilize for service to India its previously authorized one-half interest in one E-1 circuit from Manesquan, New Jersey to the theoretical midpoint of the PTAT-1 cable;[1] and

e. use said facilities to provide US Sprint's regularly authorized services between the U.S. and India and beyond.[2]

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in India, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Memorandum Opinion, Order and Authorization, DA 89-940, released August 14, 1989, File No. I-T-C-89-084, 4 FCC Rcd 6279 (1989). All terms and conditions of that order remain in force.

[2] In its April 22, 1991 letter, US Sprint states that its correspondent in India, VSN, has agreed to assume the cost to lease from MCL one E-1 circuit capacity between the theoretical midpoint of PTAT-1 and the Brean, England cable head, including one-half of the cost of the associated backhaul and DDP (Droit de Passage) facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORIONNET, INC. File No. I-T-C-91-080

Application for authority to acquire and operate facilities for service to various points in Europe and the U.S.S.R.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 26, 1991; Released: May 10, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application filed pursuant to Section 214 of the communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and the points listed in the Appendix by OrionNet, Inc.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-080 IS GRANTED and OrionNet, Inc. is authorized to:

a. lease from Comsat and operate up to two voice-grade circuits between its Shenandoah Court, Virginia and/or Auburn Hills, Michigan earth stations and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and each country listed in the Appendix hereto, furnished by OrionNet's correspondents at those points;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilities to provide OrionNet's regularly authorized services, including switched voice service, between the U.S. and the points listed in the Appendix and beyond. However, it should be noted that the Auburn Hills, Michigan earth station (KA-84, CSG-85-058-P/L) is authorized to provide IBS and related digital video services only.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between the applicant and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Austria
Azores
Belgium
Bulgaria
Cyprus
Czechoslovakia
Denmark
Estonia
Finland
France
Gibraltar
Greece
Greenland
Hungary
Iceland
Latvia
Lithuania
Liechtenstein
Luxembourg
Malta
Norway
Poland
Portugal
Romania
Switzerland
Turkey
USSR
Yugoslavia

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HALPERT AND COMPANY, INC.,
Complainant,

v.

NEW YORK TELEPHONE COMPANY, NEW JERSEY BELL TELEPHONE COMPANY,
Defendants.

File Nos. E-89-249
E-89-250

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 1991; Released: May 13, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We have before us for consideration a formal complaint filed by Halpert and Company, Inc. ("Halpert") against New York Telephone Company ("NYT") and New Jersey Bell Telephone Company ("NJB"). Halpert alleges that the defendants violated Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), by failing to restore Halpert's foreign exchange service promptly during a service outage, and by failing to provide alternative service during that outage. Halpert seeks a Commission order directing the defendants to pay compensatory as well as punitive damages for loss and injury allegedly incurred as a result of the violations. For the reasons set forth below, we deny the complaint.

II. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. Complainant is a New Jersey-based securities brokerage firm which markets its services in nearby New York City by publishing in the local media a telephone number through which it services its New York City customers.[1] In March 1988, Halpert advertised a specific service number in the New York area and alleges many of its longstanding customers relied solely on that number to reach its offices.[2] The service number was implemented through fourteen foreign exchange ("FX") lines which permitted Halpert's New York customers to reach its New Jersey office without paying toll charges. [3] NYT was responsible for originating the traffic on Halpert's FX lines at NYT's West Street central office and handing off that traffic, at a termination point located at a river crossing, to NJB to be routed to complainant's premises in Milburn, New Jersey.[4]

3. Complainant alleges that on or about Friday, March 19, 1988, NYT replaced the old electromagnetic equipment at its West Street Central office with a new digital switch (the "cutover"). Complainant states that on Monday, March 21, 1988, the first business day following the cutover, it learned that none of its fourteen FX lines were operational. Complainant claims that beginning March 21, 1988 and continuing through April 1, 1988, various of its employees and agents called both NYT and NJB to report the service outage and its detrimental effect on Halpert's business.[5] Complainant alleges that one of its employees re-registered complaints with NYT several times after being told repeatedly that NYT's computer contained no record of a previous complaint about the outage.[6] Complainant states that although service was partially restored on April 1, 1988, it continued to experience difficulties with the service on an intermittent basis, including some complete outages, until April 15, 1988.

4. Complainant contends that both NYT and NJB failed to act responsibly and in accordance with Section 201(b) of the Act[7] in handling the service outage. Complainant argues that both NYT and NJB knew in advance that some of Halpert's customers would suffer service outage as a result of NYT's cutover and, therefore, should have acted together to arrange alternative service during the outage. Complainant further alleges that both NYT and NJB knew that complainant was suffering economic harm as a result of the outage but "willfully and wantonly" failed to take actions, individually or together, that would have restored service in a timely manner. Complainant contends that as a result of defendants' failure to provide alternative service and to restore service, it suffered serious damage in terms of lost business and lost goodwill.

5. Both NYT and NJB maintain that they acted reasonably and within the terms and conditions of their respective tariffs in connection with Halpert's service outages. NYT concedes that the outages resulted from activity associated with the replacement of equipment at its West Street Central Office but maintains, in effect, that the disruptions were totally inadvertent. According to NYT, an undetected discrepancy in its database prevented it from identifying Halpert's FX lines properly prior to the cutover, and also contributed to the later delay in restoring complainant's telephone service. NYT adds that without adequate information on these circuits, new circuit design work had to be performed which required NYT to obtain additional information from NJB. NYT states that by noon of March 31, 1988, the necessary work was performed and the circuit connections were restored on all of complainant's lines. NYT attributes the intermittent service interruptions between March 31, 1988 and April 15, 1988 to problems with complainant's own customer premises equipment and to NYT's database problems. NYT points out that complainant's FX service was completely restored by April 15, 1988 and that the appropriate billing adjustments were made to reflect the service outages. The defendant argues that Halpert has failed to allege or demonstrate that it lost business or was otherwise injured as a result of NYT's actions. On the contrary, NYT states, Halpert at all times during the outage, advertised and informed its customers of an alternate number by which they could contact Halpert.

6. For its part, NJB states that its tariff bars any action for consequential damages with regard to service outages, and protects it from liability for the acts or omissions of other carriers. It also contends that Halpert failed to mitigate its damages.[8]

III. DISCUSSION

7. Initially, we note that it is well established that communications common carriers may reasonably limit their liability for loss of service suffered by a customer.[9] The Commission and the courts have reviewed tariff provisions which limit a carrier's liability to its customers for service disruptions except in cases involving gross negligence or willful misconduct and found them to be reasonable.[10]

8. Complainant here does not challenge the reasonableness of the limitation of liability provisions in the defendants' tariffs,[11] but argues instead that the provisions do not apply because the service outages were the direct result of the defendant's willful misconduct. The complainant, however, has provided no evidence or information to support its claims.[12] After careful review of the record before us, we are not persuaded that service outages at issue here were the result of any deliberate or "willful act" on the part of either NYT or NJB. Complainant has failed to show that the defendants were guilty of willful misconduct in not anticipating Halpert's need for alternative service in connection with the equipment cutover or that defendants improperly delayed restoration of Halpert's service.[13] Even if an element of negligence in the way in which NYT maintained its records of complainant's FX service circuit connections or in the manner in which the service was restored could be inferred from the record, these arguable deficiencies, without more, do not rise to the level of willful or deliberate misconduct sufficient to negate the limitation of liability tariff provisions.[14] It is undisputed that carriers can limit their liability for ordinary neglgence.[15]

IV. CONCLUSION AND ORDERING CLAUSE

9. For the reasons stated above, we find that complainant has failed to carry its burden of proving willful or intentional misconduct on the part of either NYT or NJB.[16] Therefore, defendants' liability with respect to service outages experienced by complainant is properly limited by the provisions of their respective tariffs.

10. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the complaint filed by Halpert and Company, Inc. against New York Telephone Co. and New Jersey Bell Telephone Co. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Complaint at 3.

[2] *Id.*

[3] Foreign exchange or FX lines permit the calling party to dial a number from one LATA (local access transport area) and reach a called party in another LATA (the foreign exchange) without paying for a long distance call.

[4] *Id.* at 4.

[5] *Id.* at 5-7.

[6] *Id.* Halpert states that between March 21, 1988 and April 1, 1988, it experienced a drop-off in commissions of approximately $52,000.

[7] Section 201(b) provides in pertinent part:

> All charges, practices, classifications, and regulations for and in connection with such communication service shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.

[8] NJB Answer at 6.

[9] *See* American Telephone and Telegraph Co., 76 FCC 2d 195, 198 (1980), *citing* Western Union Telegraph Co. v. Priester, 276 U.S. 252 (1928); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921); Holman v. Southwestern Bell Telephone Co., 358 F. Supp. 727 (D. Kan. 1973); American Tel. & Tel. Co. v. Florida-Texas Freight Co., 357 F. Supp 977 (S.D. Fla.), aff'd per curiam, 485 F.2d 1390 (5th Cir. 1973); Wheeler Stucky, Inc. v. Southwestern Bell Telephone Co., 279 F. Supp. 712 (W.D. Okla. 1967); Waters v. Pacific Telephone Co., 12 Cal. 3d 1, 114 Cal. Rptr. 753, 523 P.2d 1161 (1974); Cole v. Pacific Tel. & Tel. Co., 112 Cal. App. 2d 416, 246 P.2d 686 (1952); Southern Bell Tel. & Tel. Co. v. Invenchek, Inc., 130 Ga. App. 798, 204 S.E. 2d 457 (1974); Wilkinson v. New England Tel. & Tel. Co., 327 Mass. 132, 97 N.E. 2d 413 (1951); Weld v. Postal Telegraph Cable Co., 199 N.Y. 88, 92 N.E. 415 (1910).

[10] *See id.*

[11] The NYT tariff provision governing the FX service at issue here, NYT Tariff F.C.C. No. 412 § 2.1.A(B), provides:

> (A) The Telephone Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of service, and subject to the provisions of (B) through (H) following, the Telephone ompany's liability, if any, shall not exceed an amount equal to the proportional charge for service for the period during which the service was affected. This liability for damages shall be in addition to any amounts that may otherwise be due the customer as a Credit Allowance for a service interruption.

The applicable NJB Tariff contains a virtually identical provision governing its liability for service interruptions. *See* Bell Atlantic Tariff F.C.C. No. 1, Section 2.1.3(A).

[12] We note that the entire record of this proceeding consists of Halpert's complaint and defendants' answers thereto. In their answers, the defendants denied the complainant's substantive allegations and also raised a number of affirmative defenses. The Complainant elected not to file replies to defendants' answers or to seek discovery as provided under the Commission's formal complaint pleading and procedural rules. Section 1.732 of those rules, 47 C.F.R. § 1.732, provides that a complainant's "[f]ailure to reply will not not be deemed an admission of any allegation contained in the answer, except with respect to any affirmative defenses set forth therein."

[13] For example, although Halpert alleges that NYT and NJB were both guilty of willful misconduct in not anticipating the need for arranging alternative service during NYT's equipment cutover, it provides no evidence to show that the defendants knew, or should have anticipated, the service problems that arose in the NYT facilities when the cutover was implemented.

[14] *See* American Telephone and Telegraph Co., 76 FCC 2d 195 (1980).

[15] *See* Bridge Trading Co. v. Southwestern Bell Tel. Co., Mimeo No. 6617 (Comm. Car. Bur., released September 13, 1985), *citing* Pilot Industries v. Southern Bell Telephone Co., 494 F. Supp. 356 (D.C.S.C. 1979).

[16] In a Section 208 complaint proceeding, "it is axiomatic that the complainant bears the burden of proving a violation of the Communications Act or the Commission's Rules, as well as damages suffered as a direct consequence of that violation." General Services Administration v. American Telephone and Telegraph Co., et al., 2 FCC Rcd 3574, 3576, n. 31 (1987), *citing*, MCI Telecommunications Corp. v. AT&T, 85 FCC 2d 994, 999 (1981); Southern RR Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454-55; ITT World Communications, Inc., 54 FCC 2d 104, 115 (1975); Fallon Travelodge v. Churchhill County Tel. & Tel. System, 14 FCC 2d 972, 975 (1968).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MOBILFONE SERVICE, INC. File No. I-T-D-91-006

Application for authority to close Maritime Mobile Public Coast III-B Station KFL352, Tulsa, Oklahoma.

ORDER AND AUTHORIZATION

Adopted: April 30, 1991; Released: May 10, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 28, 1991 by Mobilfone Service Inc. (MSI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from Maritime Mobile Public Coast III-B station KFL352, Tulsa Oklahoma. The station is located on Concharty Mountain, 20 miles southeast of Tulsa and principally serves the Arkansas Navigational Channel between Muskogee, Oklahoma and the port of Catoosa. The application was placed on public notice on March 6, 1991. No comments were received.

2. The basic statutory test to be applied by this Commission in considering applications for discontinuance of common carrier services to a community is found in Section 214(a) of the Act. Under this Section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected" by the proposed action. Application of this standard presents the Commission with a task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its application, MSI states that traffic via the station has been steadily decreasing.[2] In view of the new availability and growth of cellular service in the area, MSI anticipates that in the upcoming year, traffic and revenue for the subject station will continue to decline. No distress or emergency calls have been received in the past three years. MSI is authorized for VHF Public Land Mobile Service and UHF IMTS to provide service to mobile stations on vessels in the Tulsa area. In addition, Carlos V. Langston of Ketchum, Oklahoma operates Public Coast Station KTR853. MSI further states that the U.S. Coast Guard station providing safety and distress coverage in the area served by Station KFL352 is at Mt. Poteau, Oklahoma, Lower Mississippi River Group.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via Station KFL352.

5. Accordingly, IT IS ORDERED that application File No. I-T-D-91-006 IS GRANTED, and MSI is authorized to discontinue service via its Maritime Mobile Public Coast III-B Station KFL352 at Tulsa, Oklahoma. However, this authorization is without prejudice to any further action the Commission might take with respect to MSI's operation of Station KFL352 without renewal of license since 1987.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Public Coast Radiotelegraph Stations, 67 FCC 2d 790 at 795 (1978).

[2]

	Calls	Revenues	Operating Expenses
November 1990	35	$173.35	$1433.00
December 1990	21	$ 98.87	$1433.00
January 1991	14	$ 76.21	$1433.00

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. — File No. I-T-D-91-007

Application for authority to discontinue operation of the Guam-Philippines cable system and to modify the cable landing license.

ORDER AND AUTHORIZATION

Adopted: April 30, 1991; Released: May 10, 1991

By the Chief, International Facilities Division:

1. The above-captioned uncontested application filed on March 12, 1991 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to permanently discontinue operation of the Guam-Philippines (GP-1) cable and to modify the submarine cable landing license accordingly. The application was placed on public notice on March 20, 1991. No comments were received.

2. The GP-1 cable connects Guam and the Philippines (the Island of Luzon). Authority to construct and operate the system was granted in October 1963.[1] AT&T proposes to discontinue operation of the cable because of its age (26 years), high maintenance costs, and low analog capacity (144 circuits). The GP-1 circuit capacity is being replaced by the digital fiber optic G-P-T Cable, which was placed in service on August 31, 1989,[2] and which has an initial capacity of 3780 64 Kbps circuits between Guam and the Philippines.

3. Upon review of the application, we find that the GP-1 cable has reached the end of its useful service life and all services have been transferred from GP-1 to G-P-T cable as of December 31, 1990. Thus there will be no impairment of service to any community or part of a community formerly served by the GP-1 cable as a result of its retirement.

4. Accordingly, IT IS HEREBY CERTIFIED that neither the present nor the future public convenience and necessity will be adversely affected by the discontinuance of use and operation by the applicant of the GP-1 cable and the substitution of other transpacific facilities.

5. IT IS ORDERED that Cable Landing License, File No. S-C-L-31 IS HEREBY MODIFIED to delete the GP-1 cable.

6. Within 60 days after the release of this order, the applicant shall notify the Commission of the accounting treatment it intends to use in retiring the GP-1 cable.

7. Upon discontinuance of use and operation of the GP-1 cable, the applicant shall notify the Commission thereof and submit to the Commission for cancellation of any submarine cable landing license it possesses covering the GP-1 cable.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *GP-1 Order and Certificate*, File No. P-C-5468, FCC 63-930; *Cable Landing License*, File No. S-C-L-31, FCC 63-929; released October 16, 1963.

[2] *Memorandum, Opinion, Order and Authorization*, File No. I-T-C-88-094, 3 FCC Rcd 5091, (released August 22, 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 10, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director decisions are released for information:

Big Island Broadcasting - Request for Refund of a filing fee - **Granted** - A total of $370.00 will be refunded (April 30, 1991).

Iglesia Bautista Castillo Fuerte - Request for Refund of application and hearing fees - **Granted** - A total of $8,560.00 will be refunded (April 23, 1991).

Steamboat Radio Partners - Request for Refund of hearing fee - **Granted** - A total of $6,760.00 will be refunded (April 10, 1991).

Tri-City Broadcasting - Request for Refund of filing fee - **Granted** - A total of $1,565.00 will be refunded (April 24, 1991).

Toole & Company - Request for Refund of hearing fee - **Denied** (April 24, 1991).

Voices North, Inc. - Request for Reinstatement of Application - **Denied** (April 23, 1991).

Winfield Broadcasting - Request for Refund of hearing fee - **Denied** (April 23, 1991).

Women Broadcasters, Inc. - Request for Refund of hearing fee - **Granted** - A total of $6,760.00 will be refunded (April 30, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-101

In re Applications of

WCCR BROADCASTING LIMITED PARTNERSHIP (Hereafter "WCCR")	File No. BPH-890316MB
HARA BROADCASTING, INC. (Hereafter "Hara")	File No. BPH-890316MD
CAPE BROADCASTING CORPORATION (Hereafter "Cape")	File No. BPH-890316ME
SHARON M. MORAN (Hereafter "Moran")	File No. BPH-890316MF
LELAND BROADCASTING GROUP, INC. (Hereafter "Group")	File No. BPH-890313MP [Dismissed Previously]

For Construction Permit for
a New FM Station on Channel 231A
in Leland, North Carolina

HEARING DESIGNATION ORDER

Adopted: March 28, 1991; Released: May 13, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* On July 17, 1989, Group filed a petition for reconsideration of the FM Branch's June 15, 1989, return of its application as not sufficient for tender.[1] The application, which was originally filed on March 13, 1989, was found to be untenderable because the transmitter site map submitted as an exhibit to Section V-B, Item 15, FCC Form 301 was not accompanied by a reduced copy of the entire 7.5 minute map as required by the FCC *Public Notice* entitled "FCC Clarifies Transmitter Site Map Requirements", Mimeo 3693 (released April 5, 1985). This *Public Notice* states that in the situation where the site lies toward the center of the map it may be inconvenient to provide a full scale photocopy which includes both the site and the margins. An acceptable alternative would be to provide a full scale copy of the section of the map containing the site. This copy must include either four of the standard printed cross-marks or one margin and two cross marks. Fine lines drawn to enclose the site should be labeled with the appropriate latitude or longitude. In addition, a reduced copy of the entire map must be included to allow the Commission's staff to verify that the lines have been correctly labeled.

3. By means of the *Report and Order* in Docket 84-750, 50 Fed. Reg. 19936 (1985), recon. denied, 50 Fed. Reg. 43157 (1985), the Commission imposed a requirement on broadcast applicants to include as part of their applications a transmitter site map as described in Form 301, Section V-B, Item 15 and in the *Public Notice*, *supra*, referenced in Item 4(b) of Appendix D of the *Report and Order*, *supra*. Compliance with this requirement, pursuant to paragraph 23 and Appendix D of the same document, is one element of tenderability or substantial completeness at the time of filing.

4. Review of Group's originally filed application reveals that it failed to include the requisite full-scale map section set forth in the *Public Notice*, *supra*. Rather, the submitted map consisted of a reduced copy of the required map which also lacked the lines which defined the latitude and longitude of Group's transmitter site.

5. Group's petition admits that the map submitted with the application fails to meet the requirements of Appendix D. Group contends, however, that the Commission staff could "confidently and reliably, drawing on the application as whole," determine its coordinates since they were used consistently throughout the application. Furthermore, Group believes that a copy of its FAA Determination of No Hazard, submitted on May 10, 1989, and which contains the same coordinates as the application, served to verify its coordinates. We disagree. The fact that Group consistently specified the same set of coordinates does not enable the staff to confidently and reliably conclude that the location of the transmitter site is, in fact, at the same coordinates. Only a transmitter site map exhibit that meets the requirements of the *Public Notice* would enable the staff to make that verification. Accordingly, reconsideration is not warranted and the petition will be denied.

6. *WCCR.* WCCR's application, as originally filed, certified that it had sufficient net liquid assets on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. However, on October 10, 1990, WCCR amended its application to report that the letter of reasonable assurance obtained from the National Bank of Washington ("NBW") probably will not be honored. WCCR states that recently the NBW was placed in receivership by Federal authorities. Subsequently, the NBW was acquired by the Riggs National Bank, which, more than likely, will not honor the NBW letter. In view of the foregoing, there is a question of whether or not WCCR's financial certification is still valid. Accordingly, a financial qualifications issue will be specified below.

7. *Hara.* On April 28, 1989, Hara amended its application by filing a copy of its local public notice published in compliance with 47 C.F.R. § 73.3580. The public notice indicates that Hara has placed its public inspection file in Wilmington, North Carolina. 47 C.F.R. § 73.3526(d) requires that this file be normally kept in the community of license of the station or applicant. In the *Memorandum Opinion and Order* in MM Docket No. 86-406, 52 Fed. Reg. 25825 (1987) (Main Studio Location), the Commission stated, "[w]e will therefor modify Sections 73.3526 and 73.3527 of the Rules to allow *stations that have been authorized* to locate their main studios

outside of the community of license under Section 73.1125(a) prior to the effective date [July 16, 1987] of the *Report and Order* [2] [in this proceeding] to continue to locate their public inspection files at the main studio" (emphasis added). Since the facilities sought by Hara were requested after the effective date of the *Report and Order, supra*, Hara will be required to locate its public file within the incorporated community of Leland and to so notify the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Moran.* Section II, Item 4 (old form) of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Moran has not completed Item 4 correctly. Moran's application gives a post office box number as the residence address. Accordingly, Moran must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. *Cape.* Engineering review of Cape's application reveals that at the time of filing it was 1.2 kilometers short-spaced to an application by Wrightsville Beach Radio Limited Partnership ("Radio") for Wrightsville Beach, North Carolina (File No. BPH-880519MI). Cape acknowledged this short spacing and requested a waiver of 47 C.F.R. § 73.207. However, as a result of action required by the *Hearing Designation Order* in Wrightsville Beach, 56 Fed. Reg., 01396 (1991), Radio amended its application. This amendment eliminated the short spacing between its application and that of Cape. Accordingly, Cape's waiver request will be dismissed as moot.

10. *Other Matters.* Hara and Moran propose to sidemount their antennas on the existing, second tower of a three-tower directional array of WMTY(AM), Carolina Beach, North Carolina. Engineering review of these applications reveals that under a "worst case" scenario, the applicants would have to erect a fence 7.1 meters from the base of the tower pursuant to OST Bulletin No. 65, October 1985 entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation." While each of the applicants have indicated that they would have a fence at the base to the tower, they both have failed to specify the location of the fence. Accordingly, Hara and Moran will be required to file Environmental Assessments, specifying the location of the requisite fence, with the presiding Administrative Law Judge within 30 days of the release of this Order. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of Hara's and Moran's Environmental Assessments, that Hara's and/or Moran's proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposal. *See* Section 1.1308(d) of the Commission's Rules.

11. WCCR petitioned for leave to amend its application on August 23, 1989, November 13, 1989 and April 17, 1990. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

14. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to WCCR, whether the applicant is financially qualified.

2. If a final environmental impact statement is issued with respect to Hara and/or Moran in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

15. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraphs 2 through 5, above, Group's petition for reconsideration IS DENIED.

16. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Hara shall place its public inspection file within the incorporated community of Leland in accordance with Section 73.3526(d) of the Commission's Rules and notify the presiding Administrative Law Judge of this location.

17. IT IS FURTHER ORDERED, That Moran shall submit an amendment which contains the information required by Section II, Item 4 (old form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

18. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 7, above, the short spacing waiver requested by Cape IS DISMISSED AS MOOT.

19. IT IS FURTHER ORDERED, That in accordance with paragraph 8, hereinabove, Hara and Moran shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by WCCR ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

22. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

23. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Cape and Moran have filed oppositions to Group's petition for reconsideration and Group has filed a reply to Moran's opposition.

[2] *Report and Order* in MM Docket No. 86-406, 2 FCC Rcd 3225 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-304

In re Applications of

REBECCA L. BOEDKER File No. BPH-870827 ML

WILLIAM PHILLIP ZURICK File No. BPH-870827 MN

For Construction Permit for a New FM Station, Channel 297A (107.3 MHZ) in Northumberland, Pennsylvania

MEMORANDUM OPINION AND ORDER

Adopted: April 26, 1991; Released: May 13, 1991

By the Commission:

1. This *Memorandum Opinion and Order* vacates a Review Board Decision, *Rebecca L. Boedker*, 5 FCC Rcd 2855 (Rev. Bd. 1990), which disqualified Rebecca Boedker (Boedker) and denied her application for a new FM Station in Northumberland, Pennsylvania, and which granted the application of William Phillip Zurick (Zurick).[1] For the reasons set forth below, we agree with the ALJ's conclusion in the *Initial Decision* (4 FCC Rcd 8328 (ALJ 1990) (I.D.)), as modified herein, that Zurick's application is preferred on comparative grounds.[2]

I. INITIAL DECISION

2. The ALJ concluded that the construction permit should be awarded to Zurick under the standard comparative issue. In assessing the parties' comparative strengths, he found that Boedker held no other mass media interests and was entitled to a 100% full-time integration credit (I.D. at ¶ 69). Qualitatively, she was awarded substantial enhancement for female ownership, moderate enhancements for local residence, civic participation and for broadcast experience (I.D. at ¶ 70). The ALJ found that Zurick held no mass media interests and that he too was entitled to 100% full-time integration credit (I.D. at ¶ 71). The ALJ awarded Zurick a substantial enhancement for local residence of 60 years, substantial enhancement for civic activities and a slight enhancement for his proposal to install auxiliary power generators (I.D. at ¶¶ 72-73).

3. With Boedker and Zurick equal on diversification grounds and both entitled to 100% integration credit, the ALJ concluded that Zurick prevailed in the subordinate areas of comparative choice (I.D. at ¶ 74). Stating that female status and civic participation are of less importance than local residence and of more importance than broadcast experience, the ALJ concluded that Zurick's long local residence and extensive civic activities far outweighed Boedker's much briefer local residence, "minimal" civic participation, moderate broadcast experience and her female status (I.D. at ¶ 74).

II. BOEDKER'S EXCEPTIONS[3]

4. Boedker challenges the comparative assessment in several respects. She contends that the ALJ should not have credited Zurick with full-time integration of ownership because he intends to delegate day-to-day management of the station to an employee. She additionally demands a remand on the ALJ's denial of her motion to enlarge issues to consider Zurick's son's possible role as an undisclosed principal in Zurick's application. She also challenges the award to Zurick of substantial enhancement credit for his long time residence in the service area, while she received only moderate credit for long residence within the proposed station's principal community service contour.

5. Boedker argues, moreover, that she was given inadequate qualitative enhancement for her female status, which can be of decisional significance. *See e.g., Cannon's Point Broadcasting Co.*, 93 FCC 2d 643, 651-653, *recon. denied*, 94 FCC 2d 72 (Rev. Bd. 1983), *review denied*, FCC 84-161, released April 13, 1984 (Comm'n), *remanded sub nom. Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated en banc*, No. 84-1176 (D.C. Cir. October 30, 1965), *reaffirmed*, 3 FCC Rcd 864 (1988) (Comm'n), (subsequent history omitted). In addition, she argues that giving Zurick's civic activities substantial enhancement credit, while Boedker's were awarded moderate enhancement credit, was error. Boedker contends that most of Zurick's civic affiliations terminated seven years prior to the application and that hers are current (citing *Radio Jonesboro* 96 FCC 2d 1106, 1110 (Rev. Bd. 1984), *rev. denied*, 100 FCC 2d 941 (1985). Overall, she believes her lengthy residence within the principal community service contour and female status outweigh Zurick's 60 year residence in the service area and civic activities.

III. ZURICK'S REPLY

6. Zurick disputes Boedker's claim that he should not receive 100% integration credit because of testimony that he intends to hire a manager. Zurick notes that he has promised to serve full time, 40 hours per week as the general manager of the station and will not have any other employment (Zurick Hearing Ex. 1, pp. 5-6). Further, Zurick maintains that Boedker's motion to enlarge issues based on Zurick's son's involvement in his application was properly denied. Zurick also contends that Boedker's attempt to get a preference for local residence is wrong as a matter of law, and states that there is no precedent for Boedker's theory that her residence within the principal community service contour is worth more than Zurick's longer residence in the service area. He asserts that the Board recently rejected a similar argument in a television case. *See Newton Television Limited*, 3 FCC Rcd 553, 559 Fn. 7 (Rev. Bd. 1988), *rev. denied*, 4 FCC Rcd 2561 (1989), *recon. denied*, 5 FCC Rcd 2755 (1990). He further cites the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), which makes a distinction only between residence in the community of license and in the service area; no distinction is made for principal community service contour as opposed

to service area residence. Finally, disputing Boedker's argument that most of his civic activities terminated long ago, Zurick asserts that Boedker's civic activities lack substance, consisting of mere membership only, and are not particularly current at all. His own activities, on the other hand, are more extensive and contrary to Boedker's claim, are indeed current.

IV. DISCUSSION

Integration

7. We reject Boedker's claim that Zurick's 100% integration credit should be diminished because he intends to hire a manager to make decisions at his proposed station. Relying on *Payne Communications, Inc.*, 1 FCC Rcd 1052 (Rev. Bd. 1986), Boedker asserts that Zurick's exclusive authority to manage and control his station will be reduced by this employee manager and argues that Zurick's testimony shows that he will not assume the kind of control required for full integration credit (Tr. 317-318). On the contrary, the record evidence discloses no such potential for loss of control. Zurick testified that he will have the "last say" on anything affecting the station. Tr. 318. Zurick also promised to serve full-time, 40 hours per week as general manager and not to have employment other than as general manager of his proposed station. Zurick Hearing Ex. 1, pp. 5-6. Further, Zurick testified that the employee manager would make decisions only in Zurick's absence, as Zurick couldn't "...be there 24 hours a day". Tr. 318. This proposal does not evidence loss of control. The Commission recognizes there are reasonable upper limits an applicant can propose to work at a station,[4] and Zurick's decision to hire a manager to handle the daily affairs and make decisions in his absence is entirely reasonable. Zurick's 100% integration credit will therefore not be diminished.

8. We also reject Boedker's related claim that an issue should have been added to determine Zurick's son's role as a possible undisclosed principal in the application. We note that Zurick paid for his application costs himself (Zurick's Opposition to Motion to Enlarge Issues, filed February 10, 1989), his son has not contributed any funds for the application's prosecution, and it is not argued that Zurick's son will contribute any funds for the station's construction. At hearing, Zurick testified merely that his son accompanied him on several Sundays when looking for a transmitter site (Tr. 308), filed public notices in local newspapers about the filing and designation for hearing (Tr. 313-314), and discussed with his father some aspects of the application before filing. Further, Boedker had ample opportunity at hearing to question Zurick on the extent of his son's involvement, which testimony yielded virtually no facts in support of her theory. Tr. at 311.

9. The test for control (to actually or potentially dominate a station) is tempered with a high burden of proof where family members are involved. *See KTRB Broadcasting Company, Inc.*, 46 FCC 2d 605 (1974). As outlined above, the actions of Zurick's son do not, as Boedker claims, constitute specific allegations of fact sufficient to raise a question that Zurick's son had an actual or potential ownership interest in his father's proposed station, particularly as the son contributed no funds to the application. To conclude otherwise would, as the ALJ found, give undue weight to mere speculation. The ALJ did not err in denying Boedker's motion to enlarge issues.

Local Residence and Civic Activities

10. As Boedker's and Zurick's applications cannot be distinguished under the diversification and the quantitative integration criteria,[5] this case turns on consideration of qualitative factors. In this regard, Boedker attacks Zurick's qualitative enhancements for local residence and civic activities and contends she was given inadequate enhancement for her female status.

11. At the outset, we do not accept Boedker's argument that her residence within the principal community service contour is entitled to more credit than Zurick's longer service area residence. Boedker has lived in towns adjacent to Northumberland since 1957, but during those years she has also resided in a community seven miles from Northumberland and in the state of Virginia for short periods of time. I.D. at ¶ 40. In contrast, Zurick has lived within the proposed station's service contour for over 60 years. In *Waters Broadcasting Corporation*, 91 FCC 2d 1260, 1262-63 ¶ 3 (1982), affirmed *sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (1984), we held that residence within the proposed service area closely follows residence in the principal community to be served. Given the substantially greater length of Zurick's residence and the fact that the credit for his residence closely follows any credit that Boedker could claim for her residence, we agree with the ALJ that Boedker is not entitled to more credit than Zurick for local residence. Her exception is therefore denied.

12. As to civic activities, Boedker disputes the ALJ's conclusion in paragraph 73 that Zurick's extensive civic involvement gave him "greater knowledge of and interest in the community." I.D. at ¶ 73. She claims that there is simply no evidence in the record to support this conclusion. Moreover, she contends that the record reveals evidence pointing to the opposite conclusion, arguing that while most of Zurick's civic affiliations terminated 7 years prior to the application (Zurick Ex. 1, pp. 3-5), most of Boedker's are current (*see Radio Jonesboro*, 96 FCC 2d at 1110), and that she therefore has the greater community awareness. This argument is not supported by the record. Zurick's civic activities are more extensive than Boedker's, spanning a wide range of interests over a long period of time, and are also more intensive, involving leadership positions, whereas most of Boedker's do not. It further appears that Boedker's affiliations are transient and require no regular meetings or require merely the payment of dues. I.D. at ¶ 41. Zurick's activities also appear to be current. (*Initial Decision* at ¶ 53-54, describing membership in county and state committees since 1984). Accordingly, considering the sum total of Boedker's civic activities compared to that of Zurick, we agree with the ALJ that Zurick's credit for civic activities significantly outweighs Boedker's minimal involvement in civic affairs.

13. We think, however, that the ALJ did err in treating local residence and civic activities as separate enhancement factors for both Zurick and Boedker. In the *Policy Statement*, local residence was considered an enhancement factor of primary importance as it "indicates a likelihood of continuing knowledge of changing local interests and needs." 1 FCC 2d at 396. As for civic activities, the *Policy Statement* said such activities "will be considered as part of . . . local residence . . . as . . . indicating a knowledge of and interest in the welfare of the community." *Id. See also Ronald Sorenson*, _____ FCC Rcd _____ ¶ 5 (19___). Therefore, while the ALJ's ultimate conclu-

sion as to the comparative outcome between Boedker and Zurick was correct, his specific holding with respect to local residence and civic participation -- that they are to be considered separate enhancement factors – does not follow the proper analysis set forth in the *Policy Statement*.

14. Since civic activities are to be considered with local residence as a unified comparative factor to determine which applicant has the greater likelihood of knowledge of and interest in the community, we now evaluate the comparative positions of Boedker and Zurick following that principle. Both Zurick and Boedker have long term local residence, and both have shown a record of civic activities. Nevertheless, Zurick has uninterrupted and longer residence,[6] and his record of civic activities is manifestly more extensive than that of Boedker. When Zurick's strengths in these respects are fully considered, it is evident that his proposal is clearly superior and that he is entitled to substantial enhancement credit for this factor.

15. Further, while Boedker's female status is a significant factor, and has sometimes been decisional (*see Cannon's Point Broadcasting Co.*, 3 FCC Rcd 864), it is not dispositive here. Female status, unlike minority status, is accorded less weight than the local residence factor. *Horne Industries, Inc.*, 98 FCC 2d 601, 602-03, para. 4 (1984). Thus Boedker's substantial enhancement for female ownership and moderate enhancement for broadcast experience[7] do not outweigh Zurick's substantial enhancement for local residence and civic participation and slight enhancement for his proposal to install auxiliary power generators. Although this is a close case, the record thus supports the ALJ's ultimate conclusion that Zurick is the applicant with the greater "knowledge of and interest in the community," that his proposal will provide the best practicable service on an overall basis, and that accordingly he is the winner on comparative grounds.

V. ORDERS

16. ACCORDINGLY, IT IS ORDERED, that pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed June 4, 1990 by Rebecca L. Boedker IS GRANTED to the extent reflected herein and IS DENIED in all other respects; that the Review Board's Decision herein, 5 FCC Rcd 2855 (1990) IS VACATED; that the application (File No. BPH-870827ML) filed by Rebbeca L. Boedker IS DENIED; and that the application (File No. BPH-870827MN) filed by William Phillip Zurick IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now before us are an Application for Review filed June 4, 1990 by Boedker and an Opposition filed July 20, 1990 by Zurick. Also under consideration are the Consolidated Brief and Exceptions to the Initial Decision filed December 28, 1989 by Boedker, Contingent Exceptions to the Initial Decision filed December 28, 1989 by Zurick, and a subsequent Reply filed January 22, 1990 by each party to the respective Exceptions above.

[2] Because we conclude that Zurick is the winner on comparative grounds, we have considered only those exceptions that pertain to decisionally significant comparative issues. We also find it unnecessary to reach the question of whether Boedker is disqualified under section 310(b), as the ALJ concluded, or whether she might have been disqualified on still other grounds, as Zurick contends in his exceptions. Finally, we need not consider whether the Review Board was correct in disqualifying Boedker on the grounds that she was not financially qualified at the time she filed her application and that she misrepresented her financial qualifications to the Commission.

[3] Zurick timely filed exceptions to the *Initial Decision* on three grounds. Only one of Zurick's exceptions is relevant to the comparative analysis here, but it is not decisionally significant. *See* note 5, *infra*. As Zurick's other exceptions do not concern decisionally significant matters, they are not addressed herein.

[4] *Cf. Pepper Schultz*, 103 FCC 2d 1052, 1056 (Rev. Bd. 1986), *aff'd* 2 FCC Rcd 1476 (1987), remanded, 3 FCC Rcd 1200 (1988) (proposal to hire no employees and to work 24 hours a day, seven days a week at proposed station rejected as *a priori* impossible); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 R.R. 2d 1325 (Rev. Bd. 1978) (applicant's commitment to a 70 hour work week rejected as not likely to be effectuated).

[5] Zurick argues that, in light of the ALJ's findings and conclusions with regard to the financial involvement of Boedker's husband in the application, the ALJ incorrectly awarded Boedker 100% integration credit. We conclude below that, even assuming Boedker receives 100% integration credit, Zurick prevails. Therefore, we need not address Zurick's exceptions to the ALJ's conclusions on this issue.

[6] In her exceptions Boedker cites *Radio Jonesboro*, 96 FCC 2d at 1108 n. 2, where "substantial" credit was given in light of local residence for upwards of 18 years. This "substantial" credit for local residence was described as such by the Review Board (and not by the ALJ). The local residence enhancement preference was awarded because, while one applicant had upwards of 18 years local residence, the other applicant had no history of local residence at all. In short, 18 years local residence is not a magic threshhold and the "substantial" award given in *Radio Jonesboro* has no analogous meaning in this comparative case, where Zurick has over 60 years local residence compared to Boedker's significantly fewer years. *See Policy Statement*, 1 FCC 2d at 393 ("(t)he various factors cannot be assigned absolute values . . . .").

[7] *See Policy Statement*, 1 FCC 2d at 396 and *Ronald Sorenson*, _____ FCC Rcd at _____ ¶ 14 (because broadcast experience generally confers only an initial advantage, it is deemed of minor significance).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Dontron, Inc. File No. BRH-890330UH

For Renewal of the License of
Station WYCA-FM, Hammond, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 1991; Released: May 10, 1991

By the Chief, Audio Services Division:

1. This proceeding involves the application of Dontron, Inc. to renew the license of WYCA-FM, Hammond, Indiana. Bernadette Cash Williams (Williams) filed a Petition to Deny the application (*Petition*).[1] Williams is a Christian evangelist who worked for the station for approximately one month in early 1989 and who listens to the station because of its religious format. In response to Williams' Petition, Dontron filed an Opposition supported by affidavits from WYCA's General Manager and Assistant General Manager. Williams filed a Reply supported by affidavits from four former station employees and several members of the religious community.[2]

BACKGROUND/DISCUSSION

2. Williams argues that many aspects of the licensee's performance during the preceding license term would make grant of its renewal application contrary to the public interest. Her allegations are numerous and address virtually every facet of WYCA's operations. For the purpose of this decision, we will group Williams' complaints into four broad categories: (1) compliance with FCC rules; (2) programming; (3) advertising practices; and (4) employment practices.

3. In assessing the merits of a Petition to Deny, the Commission is guided by Section 309(d)(1) and (2) of the Communications Act, 47 U.S.C. § 309(d)(1) and (2), as explained in *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). First, the Commission determines whether the petitioner makes specific allegations of fact that, if true, would demonstrate that grant of the application would be *prima facie* inconsistent with the public interest. If so, then the Commission proceeds to examine and weigh all of the material before it, including any opposition, to determine whether there is a substantial and material question of fact requiring resolution in a hearing. Finally, the Commission must determine whether grant or denial of the application would serve the public interest. For the reasons set forth below, we conclude that the matters raised in the Petition do not present a *prima facie* case or do not otherwise raise substantial and material questions of fact that would require resolution in a hearing.

Compliance With Commission Rules

4. Williams charges that Dontron violated many FCC rules during the license term. Specifically, she argues that WYCA: did not maintain a complete public inspection file, in violation of 47 C.F.R. § 73.3526; exceeded maximum modulation levels, in violation of 47 C.F.R. § 73.1570; broadcast telephone conversations without the callers' permission, in violation of 47 C.F.R. § 73.1206; failed to identify program material as prerecorded, in violation of 47 C.F.R. § 73.1208(a); and conducted fraudulent contests, in violation of 47 C.F.R. § 73.1216. *Petition* at 8, 12-15.

5. *Public Inspection File*. Our rules identify specific types of information related to station operations that each licensee must place in a file available for public inspection. 47 C.F.R. § 73.3526. Williams inspected WYCA's public file on May 1, 1989, and alleges that various items were missing or incomplete at that time. *Petition* at 8.

6. As the result of Williams' Petition, the Commission had its Chicago Field Office conduct an inspection of WYCA, which included an examination of the station's public file. The inspection confirmed that several required employment and ownership reports were missing. *See* 47 C.F.R. §§ 73.3526(a)(3) and (a)(5). As a result, we required Dontron to pay a $300 monetary forfeiture and to correct these deficiencies. The Commission's inspection of the public file did not reveal any other omissions.[3] Accordingly, we find that no questions of fact remain concerning the completeness of WYCA's public file and that further inquiry into this matter is not warranted. *Cf. Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2137 (Rev. Bd. 1987), *aff'd* 4 FCC Rcd 2553, *recon. denied* 4 FCC Rcd 6312 (1989) (forfeiture rather than non-renewal usually most appropriate for public file violations).

7. *Modulation Levels*. Our rules require that modulation levels for FM stations must not exceed 110%. 47 C.F.R. § 73.1570(b)(2)(ii). Williams alleges that maximum modulation levels have on numerous occasions peaked over 115%, causing listeners to complain to WYCA about signal interference. *Petition* at 14. The Field Office's June 14, 1989 inspection of WYCA did not find any problem with modulation levels.[4] Even if such problems existed in the past, however, they would be unlikely to raise a public interest concern significant enough to deny the station's renewal application. *Cf. Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1413 (1979), *aff'd* 90 FCC 2d 27 (1982) (non-renewal generally not appropriate for engineering violations). Therefore, this issue does not raise substantial or material questions of fact.

8. *Telephone Conversations*. Before broadcasting a telephone conversation, the licensee must inform all parties to the call of the licensee's intention to broadcast the conversation, except where the party is aware, or can be presumed to be aware, that the conversation will be broadcast. 47 C.F.R. § 73.1206. Williams charges that Prophet Derrick L. Davis, who hosts a live call-in show on WYCA violated this rule "constantly" because, he "would tell [callers] to hold on a moment while he got their home addresses and phone numbers, but he would not have the people off the air when he took down the information." *Petition* at 12-13; *Reply* at 3.

9. Our rule governing the broadcast of telephone conversations is intended to protect the privacy of individuals by giving them adequate notice that their conversations will be broadcast. *See Report and Order, Broadcast of*

Telephone Conversations, MM Docket No. 85-37, 3 FCC Rcd 5461, 5463 (1988). The rule presumes that a person is aware that a conversation will be broadcast if that person originates the call to the station and it is obvious that the call is in connection with a program in which the station customarily broadcasts telephone conversations. *See* 47 C.F.R. § 73.1206; *Radio Beaumont, Inc.*, 47 FCC 2d 821, 823 (1974). Because the callers in the present case originated calls to an on-the-air call-in show, we presume they were aware that their conversations would be broadcast. Although Williams suggests that the callers may have believed that they were no longer on the air when they gave their telephone numbers, she presents no evidence to support this assertion such as complaints from any person whose conversation was broadcast.[5] Thus, we find no evidence of a violation.

10. *Prerecorded Material*. Our rules require licensees to announce, at the beginning of prerecorded broadcasts in which time is of special significance, or in which an affirmative attempt is made to create the impression that the action is occurring simultaneously with the broadcast, that the program is prerecorded. 47 C.F.R. § 73.1208(a). The intent of this rule is to protect the listener from being misled by any deliberate misuse of recordings. *Re-regulation of Radio and Television Broadcasting*, 25 R.R. 2d 1719, 1721-22 (1972), *recon. denied*, 26 R.R. 2d 623 (1973). In a one sentence statement, Williams charges that "one-hour and half-hour recorded and taped broadcasts were not announced at the beginning as taped or recorded programs." Petition at 13. Williams does not show that the programs in question were of a time-sensitive nature or that absence of an announcement would mislead the listener. Therefore, she has not made a *prima facie* case.

11. *Fraudulent Contests*. A licensee that broadcasts information about a contest it conducts must fully and accurately disclose the material terms of the contest, and must conduct the contest substantially as announced. 47 C.F.R. § 73.1216. Williams claims that contests run on the WYCA show "The Spirit of Love" are fraudulent. About once an hour on this two hour show, listeners can win a prize for giving the correct answer to a biblical question or for being a specific numbered caller. *See Opposition*, Exhibit 1 at 8-9. Williams objects that the host "only announce[s] the rules of the contests a couple of times" during the program. *Petition* at 14. She also states that the host could predetermine the contest winners because callers are not put on the air and the audience has no way to verify that the winning caller satisfied the rules of the contest. *Id.*

12. Williams does not make a *prima facie* case. There is no requirement that a station announce contest rules a specific number of times or air the voices of contest winners. Rather, we require that the number of announcements made be reasonable and that the contest be conducted substantially as announced. *See* 47 C.F.R. § 73.1216, note 2. Given that each contest on "The Spirit Of Love" is completed in a short period of time (less than an hour) two or three announcements of the rules appear reasonable. There is no evidence to support the allegations that the outcome of any contest was predetermined or at variance with the announced rules.

Programming

13. Next, we examine several allegations that Williams makes concerning WYCA's programming. According to Williams the programming does not meet the needs of the community, is scheduled in a racist manner, and contains obscene language and personal attacks.

14. *Background*. In view of the Commission's sensitivity to the First Amendment rights of the public and of broadcasters, and the noncensorship provision of Section 326 of the Communications Act, 47 U.S.C. § 326, the Commission rarely interferes with the programming decisions of a licensee. With certain limited exceptions, such as obscene or indecent programming, a licensee is awarded a great deal of discretion in the programming that it presents.[6] *See Mahoning Valley Broadcasting Corp.*, 39 FCC 2d 52, 58 (1972). *See also* 18 U.S.C. § 1464. Therefore, the Commission generally reviews a licensee's programming only to determine whether the licensee has made a reasonable effort to deal with the problems of its service area, through programming responsive to issues of importance to that area. *See Deregulation of Radio*, 84 FCC 2d 968, 982 (1981), *recon. granted in part and denied in part* 87 FCC 2d 797, *aff'd in relevant part and remanded in part sub nom. Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

15. *Issue-Responsive Programming*. Williams states that WYCA's programming was unresponsive to 16 issues that she identifies as important to the community. *Petition* at 11-12; *Reply* at 19. She particularly objects to the program "Talk From the Heart" which, according to Williams' examination of the station's public file, was a major source of issue-responsive programming during the first three months of 1988. *Petition* at 9, Exhibit D1. Williams does not believe that this program meets community needs because it is not produced locally, does not permit local listeners to participate by calling-in, and presents virtually no minorities or minority views.

16. To successfully challenge the licensee's performance, the petitioner must put the overall quality of the licensee's issue-responsive programming into question. *See Office of Communications of the United Church of Christ v. FCC*, 779 F.2d 702, 712 (D.C. Cir. 1985). When a station's service area has a significant ethnic or minority population, an arbitrary refusal to program to that population's needs or to include that group in its programs could be viewed as a failure by the licensee to meet its public interest obligation. *See Citizens Communications Center*, 25 FCC 2d 705, 707 (1970).

17. Williams does not call the station's overall programming into question. Her submissions show that the station addressed many issues that it considered important to the people of Hammond, Indiana, including taxes, unemployment, AIDS, nutrition, safety, marriage, suicide, child and spousal abuse, drug and alcohol abuse, education, abortion, crime, and health. *See Petition*, Exhibit D1. The particular issues that a licensee selects are matters left to the editorial discretion of the licensee. *See Office of Communications of the United Church of Christ v. FCC*, 707 F.2d 1413, 1431 (D.C. Cir. 1983). Williams has not shown that these issues were unimportant to minorities or that the licensee failed to make a good faith effort to include minorities and their concerns in its overall programming. *See generally Time-Life Broadcast, Inc.*, 33 FCC 2d 1081, 1093-94 (1972); *WKBN Broadcasting Corp.*, 30 FCC 2d 958 (1971). A station need not present programming specifically designed for minority groups if the station's pro-

gramming for the community as a whole also satisfies needs of minorities within that community. *See Puerto Rican Media Action and Educational Council, Inc.*, 51 FCC 2d 1178, 1181-82 (1975). Nevertheless, the record shows that WYCA presents several shows designed for the minority audience. Finally, with respect to Williams' attack of "Talk From the Heart," we note that a program need not be locally produced or allow for community participation to meet the needs of a community. *See Silver King Broadcasting of Vineland, Inc.*, 5 FCC Rcd 7499, 7501 (1990); 47 U.S.C. § 153(h).

18. *Discriminatory Scheduling of Music Programming.* A station's scheduling of entertainment programming and choice of music format are matters committed to licensee discretion. *See RadiOhio*, 38 FCC 2d 721, 741 (1973), *aff'd sub. nom., Columbus Broadcasting Coalition v. FCC*, 505 F.2d 320, 327 (D.C. Cir. 1974). To the extent that a station programs entertainment in a discriminatory manner, however, this information could be relevant to our consideration of whether the station is serving the public interest. *Id.* Williams alleges that WYCA schedules music in racially motivated time slots that relegates Black recording artists to unattractive airtimes. *Petition* at 10.

19. The record shows that, with the exception of a two-hour show of Black Gospel music, WYCA plays music only when airtime between paid broadcasts remains unsold. *Opposition*, Exhibit 1 at 3-4. The licensee states that, during these unsold times, the station selects music to respond to the musical tastes of the particular audience. It plays Black Gospel music in time periods that have a large Black listenership and Contemporary Christian music in time periods with a large non-Black listenership. The licensee says that, due to the wide variance in style between Black Gospel and Contemporary Christian music, its attempts to play both consecutively have failed. Therefore, in time segments with programs with significant listenership of both Blacks and non-Blacks, the station maintains that it plays light gospel music by both Black and non-Black artists. *Id.*

20. There is no evidence that the licensee's actions constitute a policy of discrimination. *See generally Capitol Broadcasting Co.*, 38 FCC 1135, 1139 (1965). While it does appear that WYCA groups music into specific time slots, it also appears that these slots are based on musical style rather than on the race of the recording artist. It is well within a licensee's discretion to select styles of music that meet the tastes of its audience at a given time. Dontron submits Arbitron Reports that rebut Williams' argument that the station plays black artists only in undesirable time slots. *Opposition*, Attachment A. Accordingly, WYCA's music scheduling does not raise any substantial and material questions of fact.

21. *Indecency.* Although the Commission rarely interferes with program content, matters involving broadcast of obscene or indecent material are an exception. With respect to such material, the Commisssion has a statutory obligation to take regulatory action. *See* 18 U.S.C. § 1464. A program is "indecent" if it "describes in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). In analyzing whether particular material meets this definition, the Commission looks first and foremost to the context in which the language was presented. *Infinity Broadcasting Corp. of Pennsylvania*, 3 FCC Rcd 930, 932 (1987), *aff'd in part and remanded in part sub. nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

22. Williams alleges that two of WYCA's ongoing religious programs contain "obscene and vulgar language." *Petition* at 18. Williams does not give examples of the language or include a transcript or tape recording of the shows. Rather, she includes a letter from the station's public file which complains about a pastor and his wife because they said "you can go to hell," and "tongueing" on the air, talked about lesbians, and said that hair showing under a women's arms could be considered suggestive and lead to rape. *Petition*, Exhibit H. This type of submission does not provide us with sufficient information or evidence concerning the language used or its context. *See Pacifica Foundation, Inc. (KPFK - FM)*, 2 FCC Rcd 2698, 2700 (1987). Thus, this matter neither allows for a determination of indecency nor raises substantial and material questions of fact.

23. *Personal Attacks.* The personal attack rule, 47 C.F.R. § 73.1920, provides an opportunity for response to attacks on the honesty, character, or integrity of an identifiable person or group made during the presentation of views on controversial issues of public importance.[8] Williams charges that WYCA violated this rule because it aired several church programs which attacked the character and integrity of certain church leaders and denominations.

24. The personal attack rule does not prohibit attacks but, rather, provides the opportunity for response. A person or group alleging violation of the personal attack rule must provide us with specific information including the language of the alleged personal attack and a well-defined description of the issue being discussed when the attack was made. *Pacifica Foundation (WPFW-FM)*, 95 FCC 2d 750, 757 (1983). The personal attack rule was envisioned as a remedy for those attacked, not for use by unaffected third parties. *American Legal Foundation*, 58 R.R. 2d 1287, 1289 (1985). Applying these standards, Williams' claim must fail. Williams appears to be a third party raising attacks made on others. She does not specify the language of the alleged attacks or show that the alleged attacks occurred during the discussion of issues of public importance. Nor does she show that any person or group allegedly attacked requested the opportunity to respond or that WYCA denied any such request.

Advertising Practices

25. Williams contends that a number of WYCA's advertising practices impact upon the licensee's renewal application. She argues that the station discriminates in its sale of advertising to political candidates, does not identify program sponsors, engages in fraudulent billing, and permits its General Manager to to engage in "payola" and "plugola."

26. *Political Advertising.* Our rules prohibit licensees from discriminating between legally qualified candidates for public office. 47 C.F.R. § 73.1940(c). Williams alleges that WYCA sold advertising to only one candidate for Mayor of Chicago, Richard J. Daley, to the exclusion of other legally qualified candidates for the same office. *Petition* at 16.

27. We find no evidence that any candidate wishing to purchase time on WYCA during the Chicago mayoral race was denied that opportunity. According to WYCA, its political file verifies that it offered all legally qualified

candidates the same advertising opportunities and rates. *Opposition*, Exhibit 1 at 11-12. The licensee states that Daley and the incumbent mayor, Eugene Sawyer, both bought time on the station but that Daley had the largest advertising budget and was financially able to purchase considerably more air time than his opponents. *Id.* Williams has not shown that the difference in the amount of time purchased was the result of discrimination by WYCA. Thus, no substantial or material question of fact exists.

28. *Fraudulent Billing.* Williams alleges that WYCA engaged in fraud by billing advertisers for programs that did not air at their scheduled times. *Petition* at 22-23; Reply at 26. At one time, our rules regulated the billing practices of licensees but the Commission eliminated the rules on this subject several years ago because parties wronged by billing practices have adequate remedies elsewhere. *See generally Elimination of Unnecessary Broadcast Regulation*, MM Docket No. 83-842, 59 R.R. 2d 1500 (1986), *recon. denied*, 2 FCC Rcd 3474 (1987). Williams' allegations are, therefore, relevant only to the extent that they can be considered as indicative of the licensee's character. *Id.*, 59 R.R. 2d at 1510.

29. In examining character issues based on non-FCC misconduct, such as fraudulent billing, the Commission generally considers only matters that have been adjudicated.[9] *Policy Regarding Character Qualifications In Broadcast Licensing*, Gen. Docket No. 81-500, 102 FCC 2d 1179, 1204-05 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987), *modified* 5 FCC Rcd. 3252 (1990) (*Character Policy Statement*). Williams' allegations are not adjudicated. Furthermore, we do not find the allegations sufficiently supported or of such a magnitude as to warrant designation of the station's renewal application for hearing on a character issue.

30. *Sponsorship.* Our rules require that when a broadcast station transmits any matter for which it directly or indirectly receives any money or other valuable consideration, the station generally must announce, at the time of the broadcast: (1) that such matter is sponsored, paid for, or furnished either in whole or in part, and (2) by whom or on whose behalf such consideration was supplied. 47 C.F.R. § 73.1212(a). The principle underlying this rule is that listeners are entitled to know by whom they are being persuaded. *Applicability of Sponsorship Identification Rules*, 40 FCC 141 (1963) *as modified* 40 Fed. Reg. 41936 (September 9, 1975). Williams alleges that WYCA did not make sponsorship announcements for the majority of its paid half-hour and hour programs. *Petition* at 13. The licensee does not specifically address this allegation, although it does note that approximately 90% of WYCA's total weekly airtime is sold to religious programmers. *Opposition* at 4.

31. Williams' allegations are insufficient to make a *prima facie* case that WYCA violated the sponsorship provisions of Section 73.1212(a). She does not identify any specific programs or include tapes that show that no sponsorship identifications were made. We note, however, that when a station's programs consist largely of paid-for programs, that station must be particularly mindful of our requirements that it announce the sponsors of these programs. We expect that WYCA will exercise due diligence to ensure compliance with this requirement.

32. *Payola/Plugola.* Related to the requirement of sponsorship identification are two prohibited practices known as "payola" and "plugola." "Payola" exists when a licensee does not disclose that its selection of broadcast programming was influenced by a payment for that selection. *See Payola and Undisclosed Payments*, 4 FCC Rcd 7708 (1988). "Plugola" exists when a person responsible for including promotional material in a broadcast has a financial interest in the goods or services being promoted. *See Report and Order*, Docket No. 14119, Announcement of Financial Interests of Broadcast Stations, 76 FCC 2d 221 (1980) (*Plugola Policy*). Our policies do not prohibit plugs or paid promotions but, rather, prevent hidden payments or interests by requiring on-the-air disclosure. *Cf.* 47 U.S.C. § 317.

33. Williams alleges that WYCA's employees engaged in "payola" or "plugola" for The Jenny Craig Weight Loss Centres (Jenny Craig).[10] Jenny Craig purchases a heavy volume of 60-second spots on WYCA during which Taft Harris (Harris), WYCA's General Manager and on-air personality, endorses Jenny Craig products based on his successful weight loss. Williams submits affidavits from WYCA listeners alleging that, during Harris' music show, Harris plugs Jenny Craig beyond the 60-second spots and receives free food as a result. *E.g. Reply* at 49. Williams also alleges that, on one occasion, talk show host Joanne Allen plugged Jenny Craig.

34. To determine whether Williams' allegations make a *prima facie* case of "payola" or "plugola" we must review not only whether a station employee received consideration in return for broadcast mention but, additionally, whether the station provided a sponsorship identification announcement as required by Section 507 of the Communications Act. *See* 47 USC § 508(e). Assuming, *arguendo*, that Harris received consideration in return for mentioning Jenny Craig on the air, Williams has failed to provide sufficient information to indicate that this was not revealed to the listenership through a sponsorship identification announcement. Indeed, depending upon the circumstances, the mere mention of the Jenny Craig name may have constituted such compliance because Section 73.1212(f) of the Commission's Rules provides that the mention of a sponsor's name, product, or service in a manner that clearly constitutes a sponsorship identification is a sufficient announcement. Because Williams has failed to produce evidence of the nature of the broadcast mentions of Jenny Craig, we are unable to determine that the mentions of Jenny Craig were not clearly sponsor identifications sufficient to achieve compliance with Sections 317 and 507 of the Communications Act. With respect to the allegations concerning Joanne Allen, Williams has likewise failed to demonstrate that a substantial and material question of fact exists warranting a hearing. The record before us indicates that Joanne Allen apparently announced on the air her decision to become a member of Jenny Craig. *See Opposition*, Exhibit 1 at 26. Williams, however, has failed to provide any evidence or to allege that Allen received consideration from Jenny Craig for this mention -- an element crucial to a "payola"/sponsorship identification analysis. Indeed, Allen may well have paid Jenny Craig membership fees, not vice-versa. Accordingly, Williams has not made a *prima facie* case of "payola" or "plugola" with respect to either Harris or Allen.

Employment Practices

35. Williams alleges that several of WYCA's employment practices violate our rules. First, she argues that WYCA lied to the Commission in its annual employment report. She also alleges that the station does not maintain a positive Equal Employment Opportunity (EEO) program and, in fact, makes employment decisions that discriminate on the basis of race, sex, and religion.

36. *Annual Employment Report.* Licensees with five or more full-time employees must file an annual report by May 31st of each year. 47 C.F.R. § 73.3612. These reports document the employment profiles of broadcast stations during a particular payroll period of the licensee's choice. The same payroll period is reported annually. Thus, the reports provide the Commission with a "snapshot" of a station's employment of females and minorities and are not meant as a precise measure of a station's year-round employment stability or hiring practices.

37. Williams alleges that WYCA's annual employment reports do not truthfully reflect the hiring practices or stability of employees. *Petition* at 18. She does not, however, explain the manner in which the reports are not truthful or provide an affidavit or declaration from anyone claiming that the information submitted on the annual employment report is false. Furthermore, she does not specifically identify which reports are untruthful. Due to the "snapshot" nature of employment report, as discussed above, it is impossible for annual employment reports to reflect the stability or hiring practices at a broadcast station completely. Accordingly, we find that Williams does not raise a substantial or material question of fact on this issue.

38. *EEO Program.* Our rules require broadcast stations to establish and maintain positive continuing programs to ensure equal employment opportunities for women and minorities. 47 C.F.R. § 73.2080(b). Williams alleges that Dontron failed to inform its employees of its EEO program and failed to enlist its employees' cooperation with an EEO program, in violation of 47 C.F.R. § 73.2080(b)(2). *Petition* at 17. In support of this allegation, Williams refers to the licensee's failure to respond to technical and personnel concerns that she raised. She also asserts that station managers harass board operators and pay them low salaries.

39. The requirement in Section 73.2080(b)(2) that each licensee inform its employees of its EEO program and enlist their cooperation, applies only to situations involving recruitment, hiring, and promotion. It does not apply to a licensee's failure to respond to an employee's concerns of possible technical problems. Nor do our EEO requirements apply to situations in which employees receive low salaries or are harassed by station managers unless it can be shown that these activities serve to deny minorities and women equal employment opportunities. Williams has not shown that the alleged problems are EEO-related and, therefore, her claims are insufficient to support a finding that Dontron did not conduct its EEO program properly.

40. *Discrimination.* Under the Commission's general EEO policy, no broadcast licensee's employment practices may discriminate against qualified persons because of race, color, religion, national origin, or sex. 47 C.F.R. § 73.2080(a). Williams alleges that, contrary to this policy, WYCA reserves its full-time positions for Caucasians, while reserving its sales and part-time positions for Blacks.[11] The licensee indicates that WYCA currently has 11 full-time positions which are held by eight Blacks, one Hispanic, and two Caucasians. The licensee asserts that each of these employees was hired solely on the basis of ability.

41. Review of the station's annual employment reports indicates that from 1983 to 1989, Blacks constituted over 25% of the station's full-time staff. Thus, there is no indication that the station reserves its full-time positions for Caucasian applicants only. Although the station's part-time positions[12] and full-time sales positions[13] are filled primarily by minorities, Williams has not alleged sufficient facts to show that this is a result of discrimination. Furthermore, with respect to Williams' sales department allegations, we note that the Commission looks at a station's overall employment, including all upper-level job categories, rather than one upper-level job category, in assessing a station's EEO performance. *See, e.g. Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd 1907, 1909 (1988); *Miami Valley Broadcasting Corp.*, 86 FCC 2d 776, 780 (1981).

42. Williams also alleges three specific instances of discrimination: (1) the licensee's decision not to promote Williams (a Black female), but instead to terminate her employment; (2) the station's failure to hire Black applicants for a secretarial position; and (3) the station's termination of a Black staff member whose religious beliefs differed from those of station management. The Commission does not independently investigate individual complaints of employment discrimination. Rather, we have a formal Memorandum of Understanding with the Equal Employment Opportunity Commission (EEOC) regarding the exchange of information and the disposition of such complaints.[14] The Commission acts as a receiving agency for the EEOC for charges of employment discrimination and forwards such charges to the EEOC for its investigation and resolution. The date of filing of the charge with the Commission is deemed the date of filing with the EEOC.[15] The Commission, therefore, will refer a copy of the relevant portions of Williams' pleadings to the EEOC's Indianapolis District Office, 46 East Ohio Street, Room 456, Indianapolis, Indiana 46204, which has authority to investigate and to seek relief in the Hammond, Indiana area. We do, of course, take cognizance of final determinations of agencies or courts in matters involving broadcast licensees. Accordingly, Williams should notify this Commission of the EEOC's *final* determination with respect to her individual claims, and we will take whatever action is deemed appropriate at that time.

CONCLUSION

43. Based on the foregoing, we find that the Petitioner fails to raise a substantial and material question of fact requiring resolution in a hearing. We further find that the applicant herein is fully qualified and that grant of its renewal application serves the public interest, convenience and necessity.

44. Accordingly IT IS ORDERED that the Petition to Deny of Bernadette Cash Williams IS DENIED.

45. IT IS FURTHER ORDERED that the license renewal application for Station WYCA-FM IS GRANTED.

46. This action is taken pursuant to delegated authority. *See* 47 C.F.R. §§ 0.61(c) and 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads
Chief, Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] *See* 47 C.F.R. § 73.3584. Williams also claims to represent 250 members of WYCA's listening community, whose signatures she submits as Exhibit K of her Petition.

[2] Williams also filed two subsequent pleadings dated September 21, 1989 and September 25, 1989. We will not consider these unsolicited filings because they are not provided for in our Rules and present unsupported allegations of non-FCC misconduct. *See* 47 C.F.R. § 73.3584(b) and (d); 47 C.F.R. § 1.44(c).

[3] The fact that the file did not include a letter that Williams wrote to Donald Crawford, a principal of the licensee, does not demonstrate that the correspondence file was incomplete. That letter need not have been included in WYCA's public file because it was not sent to the station but rather to Crawford personally at his business address in Pennsylvania. *See Petition*, Exhibit G. *See also* Storer Broadcasting Co., 56 R.R. 2d 243 (1984).

[4] The inspection did find that the transmitter output power exceeded that authorized. *See* 47 C.F.R. § 73.1560(b). The Field Office required the licensee to correct this problem, but did not find a forfeiture appropriate.

[5] Moreover, if Williams is correct in her statement that addresses and phone numbers were broadcast on this program "constantly," it would be fair to presume that before persons placed calls to the program they would be aware that their entire call, not just the initial portion, would be broadcast.

[6] The Commission will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what is or is not good programming. *See* WGBH Educational Foundation, 69 FCC 2d 1250, 1251 (1978). Accordingly, we will not consider Williams' opinions that the program "Let's Talk About Marriage" is hypocritical, that some programs are repeated too often, that the station does not play enough music, or that it should announce the names of the songs being played. *Petition* at 9-11.

[7] Williams replies that the licensee's explanations are "contrived stories [that] were fabricated in an effort to deceive the Commission." *Reply* at 20. She states that the station's policy manuals stipulate the classes of music to be played in particular time periods without any reference to what other types of programs were on the station at the time. She further states that there is a mixture of Black and non-Black oriented programs on WYCA 24 hours a day so that time slots based on race are not justified. *Id.*

[8] The personal attack rule is a corollary of the Fairness Doctrine, which once obligated broadcasters to provide the opportunity for discussion of conflicting views on issues of public importance. The Commission no longer enforces the Fairness Doctrine because we found it contrary to the public's right to receive information and the broadcaster's right to free expression. *See Syracuse Peace Council*, 2 FCC Rcd 5043 (1987), *recon. denied* 3 FCC Rcd 2035 (1988), *aff'd sub nom., Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, _____ U.S. _____, 110 S.Ct. 717 (1990) (*Syracuse*). The decision in *Syracuse* did not address the continued enforceability of the personal attack rule, and Dontron does not raise *Syracuse* as a defense. Therefore, we are addressing Williams' personal attack allegations but not her Fairness Doctrine claims.

[9] With respect to FCC-related misconduct, acts of wilful misrepresentation to the FCC go to our core concern of truthfulness. *Character Policy Statement*, 102 FCC 2d at 1209-10. Williams alleges that the licensee lied to the Commission in its responses to a number of her allegations. *Reply* at 16-27. However, as these claims are conclusory and unsupported by the record, they do not reflect upon the licensee's character.

[10] Williams also alleges that WYCA gave preferential treatment to the Assembly of God churches, Pastor Willie James Campbell, and Pastor Joanne Allen. *Petition* at 20-21. In none of these allegations does Williams show nondisclosure of promotional consideration or the existence of financial interests. Thus, these allegations are not indicative of "payola" or "plugola." In her Reply, Williams raises several new allegations of "payola" and "plugola" involving Attorney Richard H. Wright, Paul Renard Music Dynamics, and J.J. Wright Oldsmobile. *Reply* at 24. These allegations were not properly raised in the Reply because they were not addressed in either the Petition or the Opposition. Furthermore, these claims are conclusory and present insufficient facts to make a *prima facie* case.

[11] The Gary-Hammond, Indiana Primary Metropolitan Statistical Area (PMSA), in which the station is located, has a minority labor force of 23.7% (17.0% Black, 6.2% Hispanic, 0.4% Asian-Pacific, 0.1% American Indian.) The 1989 Annual Employment Report lists four (50%) Blacks and one (12.5%) Hispanic among eight full-time employees overall and four (66.7%) Blacks and one (16.7%) Hispanic among six upper-level employees. The 1988 report lists three (33.3%) Blacks among nine full-time employees overall and three (43.9%) Blacks among seven upper-level employees. The 1987 report lists five (50%) Blacks among ten full-time employees overall and five (55.6%) Blacks among nine upper-level employees. The 1986 report lists six (50%) Blacks among 12 full-time employees overall and six (54.5%) Blacks among 11 upper-level employees. The 1985 report lists seven (63.6%) Blacks among 11 full-time employees overall and six (60.0%) Blacks among ten upper-level employees. The 1984 report lists four (26.7%) Blacks among 15 full-time employees overall and four (28.6%) Blacks among 14 upper-level employees. The 1983 report lists three (27.3%) Blacks among 11 full-time employees overall and three (30.0%) Blacks among ten upper-level employees.

As noted earlier, Williams has not alleged sufficient facts to show that the annual employment reports are unreliable. We, therefore, shall accept the truthfulness of these reports.

[12] The station's 1989 report lists nine (64.3%) Blacks among 14 part-time employees overall including eight (61.5%) Blacks among 13 upper-level employees. The 1988 report lists six (66.7%) Blacks among nine part-time employees. The 1987 report lists four (50%) Blacks among eight part-time employees. The 1986 report list five (71.4%) Blacks among seven part-time employees. The 1985 report lists six (54.5%) Blacks and one (9.1%) Hispanic among 11 part-time employees and among ten upper-level part-time employees. The 1984 report lists one (25.0%) Black and one Hispanic among four part-time employees. The 1983 report lists one (25.0%) Black among four part-time employees.

[13] The 1989 report lists three salespersons, all of whom are Black. The 1988 report does not list any salespersons. The 1987, 1986, and 1985 reports list two (66.7%) Blacks among three salespersons. The 1984 report lists one (25.0%) Black among four salespersons. The 1983 report lists two (66.7%) Blacks among three salespersons.

[14] *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978) *(MOU)*.

[15] *MOU*, 70 FCC 2d at 2330. Title VII of the Civil Rights Act requires that charges be filed within 180 days of the alleged discrimination. *See* 42 U.S.C. § 2000(e); 29 C.F.R. § 1601.13.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2977

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: May 2, 1991; Released: May 3, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2977 to introduce Virtual Telecommunications Network Service (VTNS) Option 88 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or to suspend and investigate, or provide alternative relief against Option 88 on April 5, 1991. US Sprint Communications Company Limited Partnership (Sprint) and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 88 on April 5, 1991. AT&T filed a reply on April 12, 1991.

3. Petitioners contend that Option 88 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand*[1] and must be reviewed in light of the remand. *See* Sprint Petition at 5; Williams Petition at 2, 33-34; CompTel Petition at 4. Petitioners argue that AT&T has failed to demonstrate that Option 88 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. *See* Sprint Petition at 6-9; Williams Petition at 12-18; CompTel Petition at 4-6. Petitioners also allege that even if Option 88 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *See* Sprint Petition at 9-10; Williams Petition at 20-22; CompTel Petition at 8-9 (also contending that the Commission will need to review the underlying contracts to reliably determine whether price differences between Option 88 and other Tariff 12 options are justified).

4. Williams and CompTel argue that Option 88 impermissibly bundles 800 Service with other Tariff 12 services thereby allowing AT&T to take advantage of the lack of number portability to capture almost all of a customer's other interexchange services. *See* Williams Petition at 22-24; CompTel Petition at 6-8 (also alleging that AT&T is unlawfully leveraging its market power in international services). These petitioners also claim that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. *See* Williams Petition at 24-27 (also asserting that Option 88 is not generally available); CompTel Petition at 6 n.4.

5. Williams also insists that AT&T answer approximately 60 questions which address Williams' objections to Option 88 and VTNS offerings generally. *See* Williams Petition at 2-10. Williams argues that AT&T must either reply or assume that the Commission will draw the appropriate inferences, *i.e.*, that any responses provided by AT&T would prove to be unfavorable to AT&T's position. *Id.* at 10-11 & n.6.

6. AT&T replies that petitioners here barely address the specifics of Option 88, and continue to repeat verbatim the arguments they have raised against every VTNS option filed since the *Tariff 12 Remand*. AT&T Reply at 1-3. Consequently, in response to charges that Option 88 is discriminatory, that it unlawfully bundles SDN and 800 Service, that it violates the Commission's policy on geographic rate deaveraging and resale, and that AT&T's cost support is inadequate, AT&T denies those charges and cites its previously filed replies to Options 74-86. *Id.* at 3-4, & 4 n.* & n.**. AT&T declines to respond to Williams' questions, insisting that it has complied with Part 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, and thereby satisfied all legal requirements for its tariff filing. *Id.* at 2-3.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2977, the petitions filed by Sprint, Williams, and CompTel, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket 87-568 remand proceedings. Therefore, Transmittal 2977 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

9. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2977 filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C.Cir. 1990) (*Tariff 12 Remand*), *rev'g & remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2067

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: April 29, 1991; Released: April 29, 1991

By the Chief, Common Carrier Bureau:

1. On January 30, 1991, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2067 to establish a new Special Access offering called Self-Healing Transport Network (STN). STNs are characterized by a "ring" configuration, provide redundant transmission over geographically separate facilities, and consist of three basic building blocks -- access nodes, digital transmission links (DTLs), and network access points (NAPs). The basic STN configuration consists of three access nodes, is available in four DTL volume options (3, 6, 12, or 24 DTLs), and is generally available for a minimum 36-month service commitment. Transmittal 2067, Description and Justification at 1-2 - 1-8 and 3-7. MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal 2067, and SWB filed a reply. Transmittal 2067 is scheduled to become effective April 30, 1991.

2. MCI argues that Transmittal 2067 fails to include adequate cost data to support certain discounted volume option rates. MCI Petition at 2. In particular, MCI claims that SWB has not adequately explained what cost differences, or factors, justify the discounts applied to DTL volume option 12, in relationship to option 6. *Id.* at 3-5. MCI further claims that STN service may be unreasonably discriminatory compared with similar DS3 alternate routing arrangements. *Id.* at 1-2 n.2. MCI also takes issue with the minimum 36-month service offering, calling it excessive in light of the 12-month minimum period required for SWB's DS3 service offerings. *Id.* at 6-7. Finally, MCI contends that SWB's STN rates are priced above cost, and will cause SWB to earn in excess of its authorized rate of return. *Id.* at 8.

3. SWB replies that its STN rates are neither discriminatory nor unreasonable. SWB Reply at 3. SWB argues that STN arrangements are not comparable to any configuration of DS3s, and that the characteristics of the service set it apart from other services. *Id.* at 4. SWB further asserts that its DTL volume discount options are available to any size STN customer with sufficiently concentrated traffic. *Id.* at 5. Finally, says SWB, it supplied full cost support with Transmittal 2067. *Id.* at 8.

4. The Common Carrier Bureau has reviewed SWB Transmittal 2067, its description and justification, the pleadings, and all related submissions. We conclude that no compelling argument has been presented that the tariff revisions contained in Transmittal 2067 are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 2067, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Western Union International, Inc. — Transmittal No. 1934

Tariff F.C.C. Nos. 22 and 24

ORDER

Adopted: May 3, 1991; Released: May 13, 1991

By the Chief, Common Carrier Bureau:

1. On November 16, 1990, Western Union International, Inc. (WUI) filed Transmittal No. 1934 proposing to increase certain of its telex charges. A late-filed petition to suspend WUI's transmittal was submitted on November 30, 1990, by Graphnet, Inc. (Graphnet Petition). Graphnet states only that it did not learn of the tariff filing until November 29 and requests leave to file its petition. Graphnet Petition at 1.

2. Under Section 1.773(a)(2)(ii) of the Commission's Rules, 47 U.S.C. § 1.773(a)(2)(ii), petitions to reject or suspend and investigate WUI Transmittal 1934 were due to be filed no later than November 23, 1990. Graphnet's petition was filed November 30, 1990, seven days late. Moreover, Graphnet has not demonstrated sufficient cause for the Bureau to waive the Commission's rules. Therefore, we conclude that Graphnet's petition to suspend Transmittal 1934 should be dismissed.

3. Accordingly, IT IS ORDERED that the petition to suspend filed by Graphnet, Inc., against Western Union International, Inc., Tariff F.C.C. Nos. 22 and 24, Transmittal No. 1934, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 26, 1991

Released: May 10, 1991

National Exchange Carrier
Association, Inc., Individual
Adjustment and Safeguards Audits,
AAD 91-24

Bruce W. Baldwin
President
National Exchange Carrier
Association, Inc.
100 South Jefferson Road
Whippany, New Jersey 07981

Dear Mr. Baldwin:

In response to your request, this letter extends until September 9, 1991, the deadline by which the National Exchange Carrier Association, Inc. (NECA) must file its final reports on the individual adjustment and safeguards audits required in the Commission's November 9, 1990 Letter to NECA, 5 FCC Rcd 7183 (1990)(*NECA Letter*). Previously, those reports were due May 8, 1991.

Although we do not routinely extend procedural deadlines, we are satisfied that NECA's independent auditor has made significant progress toward completion of these audits and that an extension until September 9 is necessary for realization of the Commission's audit objectives. We note, however, that the independent auditor's description of those objectives is incorrect to the extent it implies that either NECA or carriers have discretion in determining which data should be used to distribute common line (CL) revenues. *See* Letter from Bruce W. Baldwin, President, NECA, to Donna R. Searcy, Secretary, FCC, at Attachment III, p. 3 (Mar. 22, 1991)(*March 22 Letter*). The Commission required these audits to help ensure that NECA settlement figures reflect actual financial results as calculated in accordance with Commission rules. *See NECA Letter,* 5 FCC Rcd at 7183. The safeguards audit, in particular, must examine whether NECA's policies, processes, and procedures need to be changed to ensure compliance with those rules. If changes are necessary, the final report on that audit must include a description of any changes the independent auditor recommends. *Compare id. with March 22 Letter, supra* at Attachment III, p. 3.

Yours truly,

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BRIAN L. O'NEILL — File Nos. 04726-CL-TC-1-90 and 10506-CF-TC-3-90

For Transfer of Control of Panama City Cellular Telephone Company, Ltd., licensee of station KNKA662, in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 283A, Panama City MSA and stations WLU205, WLU206, and WLU207 in the Point-to-Point Microwave Radio Service in Panama City, Florida — 163500-91-20-TER

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: April 26, 1991; Released: April 30, 1991

By the Commission: Commissioner Duggan concurring and issuing a statement.

1. Before us are: (1) the captioned applications to transfer control of Panama City Cellular Telephone Company, Ltd. ("PCCTC"), licensee of Station KNKA662 in the Domestic Public Cellular Radio Service and Stations WLU205, WLU206 and WLU207 in the Point-to-Point Microwave Radio Service at Panama City, Florida, from Brian L. O'Neill ("Brian") to Palmer Cellular Partnership ("Palmer"), (collectively "Applicants"); (2) petitions to deny filed by Vanguard Cellular Systems, Inc. ("Vanguard") and Dennis L. O'Neill ("Dennis"), (collectively "Petitioners"); and (3) various related and responsive pleadings. For the reasons set forth below, we are dismissing the Petitioners' petitions to deny, and imposing a forfeiture of $50,000 for Brian's premature transfer of control of PCCTC to Palmer. We are not acting at this time on the subject application.

I. BACKGROUND

2. Brian L. O'Neill ("Brian") was named the winner of a lottery conducted by the Commission on December 15, 1986, and on February 6, 1987 he was named the tentative selectee to receive a permit to construct and operate a non-wireline cellular telephone system in Panama City. Pursuant to the terms of a pre-lottery agreement, Brian formed a limited partnership in order to convey minority ownership interests (less than 1 percent) to members of the settlement agreement. Brian's application was thereafter amended to name PCCTC, the limited partnership, as the tentative selectee.[1] On December 8, 1989, after advising the Commission that the facilities had been constructed and were ready to provide service, PCCTC was issued a license to operate Station KNKA662. Brian is now seeking authority to transfer control of his interest in PCCTC to Palmer. Vanguard and Dennis have petitioned the Commission to deny the transfer. For the reasons set forth below, we dismiss both petitions.

II. CONTENTIONS OF THE PARTIES

3. Vanguard and Dennis both allege that Brian has prematurely transferred control of PCCTC to Palmer and the subject application should, therefore, be denied. In addition, Vanguard alleges that the application should also be denied because Brian has failed to disclose the existence of certain "real parties-in-interest". Brian and Palmer both deny the Petitioners' allegations and challenge their assertions of standing.

4. *Standing*: The Petitioners claim standing by virtue of their ownership interests in PCCTC. *See* note 1, *supra*. They contend that as minority owners of the licensee, they have, at a minimum, an obligation not to condone what they believe to be violations of the Communications Act and the Commission's Rules by the licensee's principal shareholder. Vanguard and Dennis say that their failure to abide by this obligation could very likely subject them to administrative sanctions and even place their ownership interests in peril. Consequently, the Petitioners submit that they have satisfactorily demonstrated that they have standing to petition the Commission to deny the subject applications.

5. In response, the Applicants point out that an alleged minority ownership interest in a licensee does not confer standing in a transfer of control proceeding. They argue that a minority owner must establish that a grant of an application to transfer control of the licensee would very likely result in a direct injury to the minority owner. The Petitioners, say the Applicants, have not identified any palpable injury that would result from the proposed transfer of Brian's interest in PCCTC to Palmer. The proposed transaction, they say, does not affect the current ownership or the claims presently being litigated in the Florida courts. Therefore, they conclude that neither Dennis nor Vanguard has standing.

6. *Real party-in-interest*: Vanguard contends that Brian never truly owned or controlled his application or the resulting licensee. This role, says Vanguard, has been assumed by a shifting cast of Brian's advisers, who have various status in the Panama City cellular business, without being identified as being real parties-in-interest.

7. The first and primary undisclosed real party-in-interest, says Vanguard, is Brian's father, Dennis, whose influence from the beginning has been pervasive. According to Vanguard, Dennis limited Brian's involvement to entering numerous cellular lotteries, including the one for Panama City, and to contributing a small portion of the funds used for filing the applications. Dennis perfected the Panama City application and saw that the station was constructed and placed on the air. He also contributed most of the station's start up expenses. In consideration for his involvement, Vanguard claims that Dennis demanded and received one third of Brian's interest in PCCTC, as well as Brian's promise to give another one third of his interest to his sister.

8. Vanguard's "real party-in-interest" allegations are disputed by Brian and Dennis.[2] Both steadfastly maintain that Brian was the only real party-in-interest in the Panama City application and the resulting licensee.

9. Regarding the application, Dennis explains that in 1984 he concluded that the cellular radio industry presented tremendous opportunities. Consequently he participated in several applications and urged other members of his family, including Brian, to also file their own applications. Dennis says that Brian decided to take his advice. Consequently he referred Brian to the firm that was preparing his applications. This, says Dennis, was the extent of his prelottery involvement with Brian's Panama City application. He attests that he provided no funds or loans to Brian for this or any of his other applications.

10. Dennis contends that his participation in Brian's post-lottery business affairs was equally insignificant. When Brian won the lottery for Gadsden, Alabama, which was his first lottery win, he found that he needed legal counsel to assist him in perfecting his application. Once again he turned to Dennis for advice. Dennis says that he responded merely by referring Brian to the lawyer Dennis had retained. It was at this point that Dennis says his involvement with the application process ended.

11. Dennis says his involvement with PCCTC did not begin until after it had received authority to construct Station KNKA662. He explains that in August 1987, he and Brian agreed to focus their resources on developing a cellular system at Panama City. Pursuant to their agreement, Dennis says, each sold his respective interests in authorizations for Aguadilla, Puerto Rico and Gadsden, Alabama. Dennis agreed to devote his energies to developing the Panama City system and Brian agreed to convey one-third of his interest in PCCTC to Dennis as his part of the bargain. Consequently, Dennis says for the next 15 months he dedicated all of his time and energies, as well as $151,000 for start up costs, to the development of the system. Throughout this period, Dennis claims that Brian remained in control of PCCTC. Then, in the Fall of 1989, Dennis says that he and Brian had a series of business and personal disagreements that resulted in Brian barring him from further participation in the system. Finally, says Dennis, around December 1988, Brian refused to acknowledge Dennis' ownership interest in PCCTC.

12. Brian's responses to Vanguard's real party-in-interest allegations are similar to Dennis'. Initially, Brian agrees that because of his inexperience, he relied on his lawyers and engineers for advice and assistance, consulted with his father and used the services of experienced communications companies as contractors. He submits, however, that neither Dennis nor any of his other advisers is or was a real party-in-interest in his application or PCCTC. Echoing Dennis' claims, Brian points out that he filed the Panama City application in his own name. Once named the tentative selectee, he independently secured the legal and technical assistance required to prosecute his application. Having completed that task and being issued a construction authorization, Brian says he moved to Panama City in order to develop the system. He confirms that he sold his majority interest in the Alabama cellular permittee to help finance the construction and development of the Panama City facilities. Furthermore, during this time he says he was personally involved in the negotiations for the system's financing, construction and operation contracts. He concludes by saying that he was fully responsible for creating PCCTC as the operating entity for the Panama City system.

13. Brian acknowledges that he consulted Dennis during the early stages of Station KNKA662's development. However, he contends that once the station was operational, Dennis had almost no involvement in system affairs. Brian says Dennis did not have an office or keep regular hours at PCCTC and he never exercised ownership responsibilities over the licensee or the facility.

14. Nor were any of his other advisers real parties-in-interest, says Brian. For instance, chief among them was Byron Biddle, who had constructed, operated and owned a local paging concern in the Panama City area. Brian says he hired Biddle to assist in the construction, operation and maintenance of Station KNKA662. However, throughout the two years that Biddle was employed, Brian claims that he never relinquished responsibility or control over the system. He contends that Biddle consulted him, generally on a daily basis, about system matters. During this period, Brian says he supervised PCCTC's sales force, personally directed its advertising strategy, and participated in all activities concerning the selling and installation of phones.

15. Vanguard, in its reply, says that Dennis has failed to respond to most of its substantive claims. Instead, Dennis attempts to portray himself as a caring parent who lent a helping hand to his young and inexperienced son. At the same time he ignores Vanguard's showing that Dennis, without any input from Brian, first decided that Brian would file an application, and then, when he won the Panama City lottery, dictated how and by whom the system would be run. Furthermore, says Vanguard, Dennis admits that he provided $151,000 in start-up costs; that he obtained a one-third interest in the system; and that he developed the system.

16. Brian's defense, says Vanguard, is equally unavailing. Vanguard says that Brian fails to deny that he promised one-third of the system to Dennis, as well as another one-third to his sister. He does not dispute Vanguard's charge that others have claims to the licensee as well. Consequently, when these claims are taken into account, it is apparent that Brian does not have a controlling interest in PCCTC.

17. *Unauthorized transfer of control*: Vanguard and Dennis point out that on October 24, 1989, Brian and Palmer, in accordance with a sales contract they had executed earlier in the month, entered into a five year consulting agreement. It was on this date, the Petitioners say, that Palmer effectively took control of PCCTC. They claim that Brian stepped aside and Palmer immediately implemented its own policies for the management and operation of PCCTC. According to the Petitioners, Palmer, pursuant to the consulting agreement, has assumed the following roles: it handles all day to day operations of the system, including the hiring and firing of management and operational personnel; it handles all of the billing, tax accounting and payroll functions through its office at Fort Myers, Florida; it performs all the "heavy" technical work for the system; it develops and implements PCCTC's sales and marketing strategy; it provides loans to PCCTC for the system's operation; it placed all of PCCTC's employees, including Brian, on its payroll; it selected and leased PCCTC's present office space; and it changed PCCTC's policies regarding roamer charges and phone prices.

18. In contrast, the Petitioners allege that Brian's role in PCCTC has diminished to that of a nominal consultant who Palmer pays $75,000 a year to do little or nothing until Commission approval of the proposed transfer of control of the licensee is obtained. They say that Brian has neither fixed duties nor hours at PCCTC. He keeps no time records and does not appear to spend more than

eight hours a week at the system's office. Nor does he have his own office or even a desk or a telephone. The sum of his consulting duties, say the Petitioners, aside from rubberstamping items put before him for approval, has been to perform minor ministerial tasks, to sign checks for payments of $5,000 or more, and to sign a tower lease.

19. Both Brian and Palmer respond by stating that from the beginning, Palmer's presence at the Panama City facility has been in accordance with the provisions of the consulting agreement, which is not unlike others that have become customary in the cellular industry. They point out that the terms of the agreement specifies that Palmer's management of the facilities operation is at all times subject to Brian's oversight, review, supervision and control.

III. DISCUSSION

20. *Standing*: Section 309(d)(1) of the Communications Act, 47 U.S.C. §309(d)(1) requires that a party filing a petition to deny an application have standing as a "party-in-interest". Standing is imparted when a petitioner is able to show that injury in fact will result from the challenged action, and that the interest in question lies within the zone of interests to be protected by the Commission. *Cable TV Relay Service-CARS (402)*, 68 FCC 2d 696, 699 (1978).

21. We are not persuaded that Dennis or Vanguard has standing to contest this transfer of control application. The Commission has stated that "[i]n assignment or transfer of license proceedings, 'a party does not have standing unless it can establish that a grant of the application complained of would result in, or be reasonably likely to result in, some injury of a direct, tangible, or substantial nature.' [citations omitted]" *Teleprompter Corporation*, 87 FCC 2d 531, 537 (1989), *aff'd* , 89 FCC 417 (1982). They have not demonstrated how allowing Palmer to acquire Brian's interest in PCCTC would adversely affect them as minority owners. The Petitioners' interest will remain unchanged irrespective of what action is taken on the subject applications. Consequently, Dennis and Vanguard have not demonstrated that they have standing. *See Weigel Broadcasting Co.*, 6 FCC 2d 270 (1967) (minority shareholder not a party in interest within the meaning of Section 309 (d)(1)). *See also Iacopi v. FCC*, 451 F.2d 1142 (9th Cir. 1971) (minority shareholder not "aggrieved" for purposes of court review under Section 402(a)). Their petitions will, however, be addressed insofar as they raise allegations of improper licensee conduct.

22. *Real party-in-interest*: The established test for determining whether a third party is a real party-in-interest is whether the party has an ownership in the application or will be in a position to exert actual or potential control of the facility that is the subject of the application. *E.g., Mobile Phone of Texas, Inc.*, 52 RR 2d 14455, 1459 (1982). As a general matter, the Commission's public interest obligations require that it determine the fitness of every principal in each application for a radio license. Consequently, it is imperative that an applicant disclose every real party-in-interest in its application. *See*, 47 C.F.R. §22.13(a)(1). Disclosure is particularly important in those cases, as here, where the preliminary selection of an application is done by lottery. Nondisclosure of a real party-in-interest could effectively distort or skew the lottery process and thereby give an applicant an unfair advantage over the other applicants. *Cf.* 47 C.F.R. §22.921(b); *David L. Block*, 2 FCC Rcd 5978, 5980 (Mob. Serv. Div. 1987).

23. We have been presented no evidence raising a substantial and material question of fact that Brian attempted to skew or in any other way distort the Panama City lottery by withholding disclosure of parties having a prohibited interest in his application. *See* 47 C.F.R. §22.13(a)(1). Vanguard has not shown, or even attempted to show, that Dennis or any of Brian's other "advisers" held any prohibited equity interest in the Panama City application. Instead, Vanguard contends that Dennis was the real driving force behind the application. It claims that Brian was simply an obedient son who obeyed his father's orders and filed the application and thereafter stepped aside to let Dennis carry out all of the remaining obligations the application process required.

24. The Commission places a heavy burden upon a party seeking to raise a real party-in-interest issue where family members are involved. Independent family relationships may have attributes, such as financial and business ties, which in non-family situations would establish a presumption of real party-in-interest. The standard for establishing a *prima facie* presumption of real party-in-interest issue in a familial situation requires showing close business ties, a pattern of oligopolistic and anticompetitive behavior by the purported real party, and a motive for deception. *Queen City Cellular Communications*, 2 FCC Rcd 4062, 4063 (Mob. Serv. Div. 1987); *see also Cannon's Point Broadcasting Company*, 93 FCC 2d 643, 654-655 (Rev. Bd. 1983). Even assuming Vanguard has made such a showing, it has been rebutted by Brian and Dennis such that we believe no substantial and material questions of fact exist. The record shows that, while he was encouraged by Dennis, Brian filed, financed and perfected his Panama City application. Brian independently retained the lawyers and engineers he used to prepare and perfect his application. Once assembled, the application was reviewed, executed and tendered solely by him. The expenses he incurred in the application process were satisfied with money he had saved and $17,000 that he borrowed from his grandfather. Furthermore, we have been presented no evidence that Dennis, or any other party, held any undisclosed equity interest in Brian's application, or would be in a position to control the operation of the proposed facilities. Dennis did ultimately provide PCCTC with funds and his services. These transactions, however, took place after Brian was issued authority to construct the Panama City facilities, and they are not, therefore, relevant. [3] A real party-in-interest inquiry is relevant only to an undisclosed interest in an application, not a license. *See, e.g., Hearne Mobilfone*, 61 RR 2d 32 (Com. Car. Bur. 1986).

25. *Unauthorized transfer of control*: Section 310(d) of the Communications Act prohibits any transfer of control of a radio station licensee without prior Commission approval. 47 U.S.C. §310(d). This prohibition pertains to *de jure* and *de facto* control. *See Lorain Journal Co. v. F.C.C.*, 351 F.2d 824, 828 (D.C. Cir.), *cert. denied*, 383 U.S. 967 (1966). The issue at hand is whether Brian prematurely relinquished *de facto* control of PCCTC to Palmer. A determination of whether a transfer of *de facto* control has occurred requires that the Commission consider the totality of the circumstances to ascertain where actual control resides. *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC

2d 819 (1975); *George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982); *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 (Rev. Bd. 1982).

26. A comprehensive "turnkey" consulting or management arrangement does not necessarily constitute an unauthorized transfer of control. Arrangements similar to the one between Brian and Palmer have been found not to result in unauthorized transfers of control. *See Miller Communications, Inc.*, 3 FCC Rcd 6477 (Mob. Serv. Div. 1987); *Jacksonville Cellular Telephone Corp.*, 2 FCC Rcd 6416 (Mob. Serv. Div. 1987), *aff'd*, 3 FCC Rcd 5386 (1988); *Rodney A. McDaniel*, 2 FCC Rcd 5402 (Mob. Serv. Div. 1987); *Millicom of Omaha, Inc.*, 2 FCC Rcd 3754 (Com. Car. Bur. 1987). On its face, the subject consulting agreement appears to comport with the Commission's control requirements. It expressly and categorically provides that Brian retains full ownership authority and responsibility over PCCTC. Nevertheless, consideration of the "totality of the circumstances" requires that we look beyond the four corners of the agreement in determining the locus of *de facto* control.

27. The traditional method used to determine who controls a cellular radio licensee is to examine the following factors: (1) Does the licensee [party legally controlling the licensee] have unfettered use of all facilities and equipment? (2) Who controls daily operations? (3) Who determines and carries out the policy decisions, including preparing and filing applications with the Commission? (4) Who is in charge of employment, supervision and dismissal of personnel? (5) Who is in charge of the payment of financing obligations, including expenses arising out of operating? and (6) Who receives monies and profits derived from the operation of the facilities? *Intermountain Microwave*, 24 RR 983, 984 (1963).

28. Applying these criteria to the facts presented reveals the following findings. *Use of the facilities*. It is undisputed that Brian has complete access to the PCCTC facilities and equipment. Whether he does or does not have a private office and keeps regular hours is immaterial. The controlling factor is that his access is unimpaired. *Day to Day Operations*. Many aspects of PCCTC's operations have been relocated to Fort Myers where Palmer has an office. We do not draw a negative inference from this fact, however. Most of the functions performed at Fort Myers are ministerial in nature. Moreover, the day to day services provided by Palmer are pursuant to the terms of the consulting agreement which expressly states that control of these functions is retained by Brian. *Policy Decisions*. There appear to have been very few changes in PCCTC's policy since Palmer's affiliation with the licensee. What policy changes that have been made, such as the adoption of Palmer's billing vendor recommendation and use of its roaming agreements, were specifically approved of and consented to by Brian. *Personnel Responsibilities*. The record indicates that Brian has hired and fired employees since Palmer's involvement. However, it does not indicate that Brian took these actions before his application to transfer control of PCCTC was contested. The record also discloses that Palmer has recruited and retained many of PCCTC's key personnel. This action had Brian's approval, however. Finally, it appears that all of PCCTC's employees, including Brian, are being paid by Palmer. *Financial Obligations*. Palmer has provided PCCTC approximately $600,000 to enable it to meet its operating expenses. These funds were advanced without any specified terms regarding interest or repayment obligations. In addition, Palmer has advanced Brian $350,000 toward the purchase price of his interest in PCCTC, and, as noted previously, Palmer has employeed Brian as a consultant. He is paid biweekly at an annual salary of $75,000. He does not have an employment contract specifying his responsibilities to Palmer. Moreover, Brian admits that he is seldom at PCCTC's facilities and, aside from signing checks for payments of $5,000 or more, he is hard pressed to explain what his duties are. *Receipt of Monies*. Palmer performs PCCTC's billing functions, collects its revenues, and, up to the time that the instant petitions to deny were filed, deposited these monies in an account held by Palmer. In view of Palmer's pervasive and substantial involvement in PCCTC's personnel and financial matters, we find that Brian has failed to maintain the normal minimum incidents of control required of a common carrier licensee. Brian did relinquish control of PCCTC to Palmer, at least between October, 1989, when he agreed to sell his interest in PCCTC to, and May, 1990, when he claims to have reassumed complete control of PCCTC.

29. Of late, Brian has taken a more active role in PCCTC's affairs. He now has an office of his own; he is spending more time at the facilities; and he has made it known to all of PCCTC's employees that he is in charge, admonishing them to let it be known that PCCTC, rather than Palmer, is the licensee of Station KNKA662. It also appears that all of the facilities' revenues are now deposited into a PCCTC account. While these subsequent actions are laudable, they do not excuse the unauthorized relinquishment of control of a Commission licensee that had occurred previously. *See Satellite Relay, Inc.*, 1 FCC Rcd 452 (ALJ 1986).

30. Despite Brian's having prematurely conveyed actual control of PCCTC, we do not believe a hearing is warranted. *See, e.g., Intermountain Microwave, supra*. The record in this proceeding is exhaustive. We have reviewed over 200 pages of formal pleadings and even a greater volume of exhibits. We have also been provided with both written and video transcripts of depositions of relevant parties in this proceeding. After having culled all of this material we have found no pattern of intentional unauthorized transfer of control or of active concealment or deliberate misrepresentation. Instead, we found that Brian was trying in good faith to operate a station that had not only failed to show a profit but would also require more capital infusion than he could probably secure. Added to these concerns were several law suits with their attendant emotional and monetary costs. While all these things were happening, Brian was approached by Palmer who had the business and technical experience, as well as the financial resources to make the system's operation a success. Brian, therefore, decided to sell his interest in the licensee. He did not want to see the system into which he had put so much money and labor fail. Palmer, unlike Brian, is a seasoned licensee that is fully aware of the need for Brian to retain ultimate control over PCCTC until the Commission authorizes the transfer. Consequently, Palmer attempted to take all the prescribed measures needed to insure that the Commission's requirements were met. Its consulting agreement specifically provides that all services rendered by Palmer are subject to Brian's oversight, review, supervision and control. Furthermore, Leon Hensen, the Palmer employee who was primarily responsible for implementing the consulting agreement, was instructed to ensure that Brian remained in control of PCCTC, and that he be accorded all the deference due

the owner and licensee of a cellular system. While there is no evidence that the violation was intentional or egregious, nevertheless an unauthorized transfer of control did occur. Brian did not exercise the diligence required of him. He, in effect, walked away from certain critical responsibilities, leaving Palmer with little choice but to see that the decisions were made, and the public continued to be served. Nevertheless, we believe Palmer should have been more circumspect in its assumption of responsibilities concerning the operation of the licensee. Consequently, Palmer must share part of the blame for the premature transfer of control of PCCTC. However, in light of the lack of intent and nonegregious nature of this particular unauthorized transfer of control, we do not believe either Brian's or Palmer's qualifications to be a licensee are called into question. Accordingly, we find that a monetary forfeiture, rather than designation for hearing on these issues for possible denial and revocation, is the appropriate remedy for Brian's and Palmer's failures to meet their responsibilities. Furthermore, because our action is based on admitted facts, a hearing is not required to further develop the record in this proceeding.

31. Regarding the subject application, we are deferring to a later time our determination of whether the transfer of control of PCCTC is in the public interest.

IV. ORDERING PARAGRAPHS

32. Therefore, for the foregoing reasons, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. §503(b), and Section 1.80(f)(4) of the Commission's Rules, 47 C.F.R. §1.80(f)(4), IT IS ORDEREI that Panama Cellular Telephone Company, Ltd. and Palmer Cellular Telecommunications Radio Service shall each FORFEIT to the United States the sum of Twenty Five Thousand Dollars ($25,000) for violation of Section 310(d) of the Communications Act, 47 U.S.C. §310(d). Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, D.C. 20036.

33. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Panama Cellular Telephone Company, Ltd. and Palmer Cellular Telecommunications Radio Service, Certified Mail, Return Receipt Requested.

34. IT IS FURTHER ORDERED, that the Petitions to Deny filed by Dennis L. O'Neill and jointly by Emerald Coast Communications, Inc. and Warren & Lewis, Ltd., wholly owned subsidiaries of Vanguard Cellular Systems, Inc., ARE HEREBY DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] By virtue of his holdings in PCCTC's general partner and one of its limited partners, Brian claims a 76.24 percent equity interest in the licensee. His ownership interest in PCCTC, however, is the subject of two lawsuits presently before the Florida courts. In one suit a group of approximately 88 applicants for Panama City claim Brian has breached a pre-lottery settlement agreement, wrongfully denying them minority rights in PCCTC. Vanguard, which owns a 12.940 percent interest in PCCTC, through a subsidiary, is claiming an additional 28 percent interest in PCCTC by virtue of its ownership of a second subsidiary, and Dennis is claiming a 0.99 percent ownership interest in PCCTC. *Emerald Coast Cellular Telephone Corp. et al. v. Brian O'Neill et al.*, Case No. 87-3325 (Bay County Circuit Court). In the second suit Dennis makes a separate claim to one third of Brian's interest in PCCTC. *See Dennis L. O'Neill v. Brian L. O'Neill et al.*, Case No. 89-3596 (Bay County Circuit Court).

[2] Palmer also disputes Vanguard's allegations. However, because Palmer's contentions on this issue are subsumed by those put forth by Dennis and Brian, they will not be presented separately.

[3] We believe the fact that Dennis was barred by Brian from participating in any of PCCTC's affairs dispels the notion that Dennis ever controlled the licensee.

CONCURRING STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In Re: Applications of Brian L. O'Neill, File Nos. 04726-CL-TC-1-90 and 10506-CF-TC-3-90

I concur in the majority's judgment that there has been an unauthorized transfer of control here, and that forfeitures are in order. In my view, these matters are separable from the question of whether it is in the public interest for the Commission, in the future, to grant this application for transfer of control. On that matter, I shall reserve judgment.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-308

In re Applications of

REAL LIFE EDUCATIONAL FOUNDATION OF BATON ROUGE, INC. — File No. BPED-840322CA

JIMMY SWAGGART MINISTRIES — File No. BPED-840822IF

For Construction Permit for a New Noncommercial Educational Broadcast Station, Channel 203C2, in Baton Rouge, Louisiana

Appearances

James J. Popham, Esq. on behalf of Real Life Educational Foundation of Baton Rouge, Inc.; *Eric L. Bernthal, Esq., Everett C. Johnson, Esq., Michele Brown, Esq.* on behalf of Jimmy Swaggart Ministries, Inc.; and *Charles E. Dziedzic, Esq.*, and *Y. Paulette Laden, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

Adopted: May 2, 1991; Released: May 14, 1991

By the Review Board: Marino (Chairman), BLUMENTHAL and ESBENBEN.

Board Member BLUMENTHAL:

1. The Board has before it the *Initial Decision*, 4 FCC Rcd 8433 (1989) (*I.D.*), of Administrative Law Judge Richard L. Sippel (ALJ) in the above-captioned proceeding. It also has the exceptions of Real Life Educational Foundation of Bation Rouge, Inc. (Real Life) and the reply of Jimmy Swaggart Ministries (JSM).[1]

2. The *I.D.* awarded the Construction Permit at contest to JSM on the determination that JSM was superior to Real Life, not only on the factor of comparative signal coverage, but on the strength of the ALJ's perception that JSM would better integrate its educational objectives into the radio station operation. As modified, we will affirm the award to JSM.

PRELIMINARY MATTERS

3. *Media Diversification.* For reasons more fully explained therein, the Board responded to Real Life's exception that, in view of recent FCC policy changes,[2] JSM should have been assessed a substantial comparative diversification dermerit by certifying that novel question to the Commission itself. *Memorandum Opinion and Order*, 5 FCC Rcd 3420 (Rev. Bd. 1990) (*Certification Order*). And, for reasons more fully set forth in *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCC Rcd 259 (1991), the Commission reacted to our *Certification Order* by proclaiming that its prior policy, first expounded in *New York University*, 10 RR 2d 215 (1967), of not considering media diversification in noncommercial licensing cases remained unchanged by its very recent policy of affirmatively considering noncommercial service, under 47 U.S.C. § 307(b), in comparative contests for new commercial broadcast facilities. Consequently, Real Life's exception to the ALJ's refusal to assess a diversification demerit against JSM is peremptorily foreclosed before this subordinate Board.[3]

4. *Ascertainment of Community Needs.* Before engaging in a full discussion of the other Real Life exceptions, some background is necessary to imbue the burden of several of its primary grievances with contextual significance. As suggested in the foregoing paragraph, the 1967 *New York University* proceeding announced that in noncommercial comparative licensing cases competing applicants would not be measured against each other on the "standard comparative criteria" earlier established in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). Rather, the Commission stated at that time that the 1965 *Policy Statement's* "standard comparative criteria (local residence, integration, broadcast experience, etc) are virtually meaningless in a [noncommercial comparative case] of this type." *New York University*, 10 RR 2d at 217. Instead, the Commission therein formulated what became popularly known as the "standard *noncommercial* comparative criteria," a central element of which was "[t]o determine the extent to which each of the proposed operations will be integrated into the overall educational operation and objectives of the respective applicants." *Id.*, at 213.

5. However, not long after the issuance of *New York University*, and responding to a (then) evolving line of Commission comparative case precedent, the Board expanded the noncommercial comparative criteria to include a *second* key prong to determine "the manner in which [the noncommercial applicants] meet the needs of the community to be served." *Pacifica Foundation*, 21 FCC 2d 216, 221 (Rev. Bd. 1970). The Board's 1970 action in *Pacifica Foundation* was subsequently ratified in the Commission's successive hearing designation orders in all ensuing noncommercial comparative cases, and ascertainment of community educational and cultural needs thereafter became a fixture of the "standard noncommercial comparative issue." *See, e.g., Seattle Public Schools*, 4 FCC Rcd 625, 626 (Rev. Bd. 1989); *see also Black Television Workshop of Santa Rosa, Inc.*, 65 RR 2d 34 (Rev. Bd. 1984)(late printing); *Southeastern Bible College, Inc.*, 85 FCC 2d 936, 937 (Rev. Bd. 1981).

6. But, departing without any explanatory discussion from nearly twenty years of noncommercial case precedent, the *Hearing Designation Order*, 3 FCC Rcd 4359 (1988) (*HDO*), in the case at bar omitted entirely the "ascertainment" prong of the standard noncommercial

comparative criteria.[4] Notwithstanding the absence of the heretofore obligatory "ascertainment" prong in the instant *HDO's* expressly designated issues, the ALJ here presiding plainly imputed an "ascertainment" issue, measured both current applicants as against that second prong element, *see I.D.*, paras. 12-17; 39-49, and he ultimately concluded "that JSM's ascertainment methodology . . . was superior to Real Life's." *id.*, at para. 70. He thus favored JSM in his ultimate comparative conclusions because, in his view, "JSM has shown by a preponderance of the evidence that it has the means and has use of a reasonable method to successfully ascertain community needs." *Id.*, at para. 80. Pointing to the absence of a designated "ascertainment" issue, Real Life excepts strongly to the *I.D.* 's consideration of ascertainment,[5] while JSM generally supports the ALJ's assessment.[6]

7. The Mass Media Bureau's failure to include in the *Hearing Designation Order* either the community ascertainment prong employed regularly since 1970, or an explanation for its conspicuous absence, has presented the applicants, the ALJ, and the Board with an unnecessary dilemma. Still, there can be scant doubt that the Mass Media Bureau's failure to include the community ascertainment prong in the specific issues governing this case was a deliberate policy change, as witness the fact that the designation order in a contemporaneous noncommercial comparative case likewise omitted the community ascertainment prong from the issues set down there. *Maricopa County Community College District*, 3 FCC Rcd 5637, 5639 (1988). The same is true of the hearing designation order in the more recent *Cabrini College*, 4 FCC Rcd 5462 (1989). Hence, the Board is actuated to infer that the failure of the instant *Hearing Designation Order* to require an ascertainment inquiry was not simply the consequence of bureaucratic inadvertance, but a purposeful policy choice. We recognize that the Board is bound by a hearing designation order only where "specific reasons are stated for . . . action or inaction in a designation order," *Atlantic Broadcasting Co.*, 5 FCC 717, 721 (1966); and, as we have lamented, the instant *Hearing Designation Order* is utterly mute as to this rather obvious policy amendment in noncommercial comparative cases. Yet, it was the Board itself that noted in its 1988 *Seattle Public Schools* decision that the Commission's 1984 elimination of ascertainment requirements for noncommercial broadcasters[7] might impact on the *Pacifica Foundation* ascertainment prong of the "standard noncommercial comparative issue." *See* 4 FCC Rcd at 642 and 649 n.70. We there opined:

> In light of the Commission's 1984 *Deregulation Order*, and particularly that portion eliminating the need for formal ascertainment, *see* 98 FCC 2d at 752-754, we regenerate our suggestion that the Commission revisit the noncommercial comparative issue with an eye towards reconciliation. In this case, we are operating under the 1976 noncommercial *Ascertainment* regime. In any future cases, the *Deregulation Order* language could create even further confusion as to the current intent of the second prong of the noncommercial comparative issue.

In this immediate case, as in *Maricopa County* and *Cabrini College*, it must logically be assumed that these latest noncommercial hearing designation orders were newly framed in belated obeisance to the Commission's 1984 *Deregulation Order* (*see supra* note 7) by simply omitting, albeit *sub silentio*, the erstwhile ascertainment prong. In light thereof, we are constrained to honor Real Life's exceptions going to this vigorously disputed point, and we will not compare the two applicants before us on their community ascertainment efforts or proposals. Rather, repeating the respectful suggestion of (former) Board Member Jacobs in *Black Television Workshop*, 65 RR 2d at 35-36, that the Commission initiate a considered review of its noncommercial comparative criteria, we will move on to the exceptions related to the remaining issues, as those issues were expressly laid down in the *Hearing Designation Order*.[8]

EXCEPTIONS

8. *Integration of Cultural and Educational Objectives.* Under Issue 1(b), the ALJ faulted Real Life, which proposes general interest educational fare, reading service to the blind, classroom instruction, and "Christian rock music," for its failure to have demonstrated any "cultural objective." *I.D.*, para. 11. The ALJ also found that, as to its "educational objective," Real Life had failed to adequately demonstrate that the proposed coordination of its educational program with Louisiana State University (LSU) was likely to come to fruition. *See id.*, paras. 12-20. In that latter regard, the ALJ flatly rejected as an "untested sworn written statement," *id.*, at para. 14, the declaration of Dr. Fritz McCameron, LSU Dean of Continuing Education, which stated in part:

> Dr. McCameron is familiar with the proposal of Real Life to make time available for the broadcast of instructional programming on its proposed noncommercial radio station in Baton Rouge, Lousisana. He considers this a valuable opportunity for LSU to provide additional instructional programming to its students and residents in the Baton Rouge area. Dr. McCameron will work with Real Life to select courses to be offered on Real Life's station. Subject to the approval of the LSU administration and coordination of courses with various academic departments at LSU, LSU will offer instructional courses for credit on Real Life's proposed FM station in Baton Rouge.

Real Life Exhibit 18.[9] Real Life also insists that it should have received a comparative preference for integrating three of board members into station management.[10]

9. By much the same token, the ALJ found that "there is no evidence of JSM having any cultural objective." *I.D.* at para. 9. As to its educational objectives, the ALJ found that JSM proposed to use its station as an adjunct to Jimmy Swaggart Bible College, both for student training and for offering college credit courses *via* radio. *Id.*, paras. 50-53. In the end, he concluded that "JSM's radio programming will be integrated into the educational objectives of JSM" because of its ongoing Bible College affilliation. *I.D.*, para. 73.

10. *Discussion.* Our review of the record and the pleadings persuades us that neither applicant is entitled to a meaningful preference under this issue. Though we reject Real Life's demand that it receive comparative credit for the management integration of several of its board members, *New York University*, 10 RR 2d at 217 (management integration is "virtually meaningless"), we agree that it has

amply demonstrated the proposed integration of its cultural and educational objectives. In fact, both applicants have proposed a variety of "educational and cultural" programs. *Compare I.D.*, paras. 17-22 (Real Life proposals) *with id.*, paras. 44-49 (JSM proposals). Even if Real Life's anticipation of the participation of LSU does not materialize in full, it also proposes to utilize "a variety of sources such as National Public Radio, the Corporation for Public Broadcasting, and the Moody Bible. Institute." *I.D.*, at para. 18 (footnote omitted). Though Real Life's aims seem somewhat more secular overall, while JSM's are rooted in the propagation of its sectarian ministry, we decline Real Life's invitation to become enmeshed in a subjective choice as between its particular orientation and that of JSM.[11] *See generally NBC v. U.S.*, 319 U.S. 190, 226 (1943) ("Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."); *cf. Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 676-77 (1970)(gov't must show "benevovlent neutrality toward churches and religious exercise"); *The King's Garden v. FCC*; 498 F.2d 51, 60 (D.C. Cir. 1974) ("sectarian tone or perspective" to general run of programming is permissible). To the degree that Issue 1(b) can be objectively applied in the case before us, no rational distinction between the applicants can be extracted from this record.

11. *Other Factors: Comparative Signal Coverage.* Inasmuch as JSM would provide a second noncommercial aural service ("gray" area) to approximately 22,000 more persons than would the proposed signal of Real Life, the ALJ awarded JSM "a moderate comparative coverage preference." *I.D.*, para. 74. JSM does not dispute the underlying engineering data, but argues that JSM's preference here should be no more than "slight."[12] In the past, the Board has awarded a "moderate" preference for "gray" area service to an appreciable number of listners. *Communications Properties, Inc.*, 92 FCC 2d 45, 49 (Rev. Bd. 1982) (moderate preference for second nighttime service to 4,456 persons). We find no error here and affirm this aspect of the *I.D.*

12.*Other Factors: Auxiliary Power.* In commercial radio cases, a slight preference is routinely awarded to applicants who offer to install emergency power equipment. *See, e.g., Communications Properties*, 92 FCC 2d at 50 (citing *Policy Statement Addendum*, 2 FCC 2d 667 (1967)). Conceding that "there is no direction given with respect to noncommercial cases," but relying upon *Apogee, Inc.*, 59 RR 2d 941, 943 (1985)(auxiliary power preference awarded in "AM and FM radio broadcast proceedings"), the ALJ nevertheless accorded Real Life a "very slight comparative preference" for its emergency power proposal. *I.D.*, para. 78. JSM has not excepted to that ruling; and, for future reference, we can conjure no readily explicable reason to distinguish between commercial and noncommercial applicants on the matter of emergency power. *Eadem est ratio, eadem est lex.* However, Real Life's "slight" preference here cannot outweigh JSM's much stronger preference for comparative (noncommercial) signal coverage.

CONCLUSION

13. Having found that neither JSM nor Real Life can be preferred under Issue 1(b) (integration of cultural and educational objectives), we believe that JSM, with its "gray" areas edge of 22,000 persons, is to be preferred under Issue 1(c) (other factors). *See Communications Properties.*

14. ACCORDINGLY, IT IS ORDERED, That the application of Jimmy Swaggart Ministries (File No. BPED-840822IF) for a construction permit for a new noncommercial educational broadcast station IS GRANTED, and the application of Real Life Educational Foundation of Baton Rouge, Inc. (File No. BPED-840322CA) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] While this case was argued nearly one year ago, our action was deferred until the Commission responded, in February of this year, to our certification of a novel media diversification question raised in Real Life's exceptions. (*See infra* para. 3 of our text.)

[2] *See, e.g., Valley Broadcasters*, 5 FCC Rcd 2785 (1990); *see also Channel 32 Broadcasting Co., FCC 91I-026, released April 17, 1991* (requesting, for comparative signal coverage purposes, further engineering data on noncommercial television service in commercial television licensing proceeding). Our *Certification Order* also noted that, in the Board's contemporaneous decision in *Advanced Broadcast Technologies*, 5 FCC Rcd 1960, 1964-65 (Rev. Bd. 1991), it had affirmed the ALJ's assessment of a comparative diversification demerit against Pennsylvania State University for its possession of a noncommercial FM facility in a comparative contest for a new commercial FM frequency. The Commission has since affirmed *Advanced Broadcast Technologies, see* 5 FCC Rcd 7651 (1990).

[3] As indicated in the preceding footnote, the Board is aware that the Commission's Office of General Counsel just recently requested that all of the competing applicants for a new commercial television station in Kansas City, Missouri recalculate their "white" and "gray" area signal coverage to include (for the first time) noncommercial stations. *Channel 32 Broadcasting Co.*, 91I-026, released April 17, 1991. At the same time, however, the Commission's response to our *Certification Order* in this very case reaffirmed the extant *New York University* principle that, in noncommercial comparative licensing cases, commercial service (even if provided by the same applicant in the same community) is not a comparative factor to be considered. Thus, unless and until the Commission's policies involving the comparative cross-recognition of commercial and/or noncommercial services are expressly altered, the Board will not consider commercial service in noncommercial cases.

[4] The only issues set down for evidentiary inquiry in the instant *Hearing Designation Order* are:

> 1. To determine (a) whether a share-time arrangement between the applicants would result in the most effective use of the channel and thus better serve the public inter-

est, and if so, the terms and conditions thereof; (b) the extent to which each of the proposed operatons will be integrated into the overall cultural and educational objectives of the respective applicants; and (c) whether other factors in the record demonstrate that one applicant will provide a superior FM educational broadcast service.

2. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3 FCC Rcd 4360. As to Issue 1(a) above (share time), the ALJ accepted the representations of the parties that, because of irreconcilable differences in the "theology, liturgy, [and] proselytizing methods" of these two religion-based applicants, *I.D.*, para. 79, "this case is not appropriate for an enforced share time agreement that the parties are unwilling to undertake voluntarily." *Id.*, at para. 80. Nevertheless, the Board recently inquired again of the parties as to their amenability to a share time arrangement, but were informed by letter of counsel of March 6, 1991 that both parties adhere to their prior positions and that neither party filed an exception to *I.D.* in this respect. The Board will not, therefore, disturb this wholly unchallenged aspect of the *I.D. See Maricopa County Community College District*, 5 FCC Rcd 7614, 7615 n.6 (Rev. Bd. 1990).

[5] Real Life Exceptions at 8-12.

[6] JSM Reply at 6-13.

[7] *Program Policies and Reporting Requirements Related to Public Broadcasting Licensees*, 98 FCC 2d 746, 752-54 (1984) (*Deregulation Order*).

[8] In *Black Television Workshop*, we reported the incessant complaints of our noncommercial broadcast applicants that the "standard noncommercial issue" had become "vague," "amorphous," and ultimately "meaningless," a concern we candidly shared. 65 RR 2d at 35. Now that the "ascertainment" prong, quite apparently, has been totally eliminated as a comparative criterion, what precious little remains of the "standard noncommercial compartive issue" will make it difficult, if not impossible, to expound a rational choice in most noncommercial licensing cases. Indeed, but for the fact that JSM here prevails on a signal coverage preference, no justifiable choice could be made between the two noncommercial applicants before us.

[9] In fact, Real Life complains that, not only did the ALJ refuse to credit its Exhibit 18 (despite his prehearing *Order*, FCC 88M-3187, released September 27, 1988, calling for the applicants to submit their direct written cases in the form of "sworn frozen written testimony"), *see* Real Life Exceptions at 13, he held against Real Life the fact that Dr. McCameron did not give oral testimony, and even went so far as to presume that such testimony would have been adverse. *See I.D.*, para. 12 & n.3. We agree with Real Life. Where the ALJ has called for written cases prior to hearing, a matter well within his discretion (*see* 47 CFR § 1.248(d)), he should not fault an applicant for a failure to present such evidence orally. JSM did not object to the acceptance of Real Life's Exhibit 18, and we will consider the exhibit for our own review purposes.

[10] Real Life Exceptions at 29-30.

[11] *See* Real Life Exceptions at 20-23.

[12] Real Life Exceptions at 31-33. It also argues that the Commission's policy of limiting the comparative signal coverage calculation to only noncommercial stations "blinks reality," and it maintains that recent policy demands that commercial stations also be included in any signal coverage analysis. Although we have above acknowledged a growing cross-recognition of commercial and noncommercial broadcast services, *see Channel 32 Broadcasting, supra* notes 2 and 3, the *Hearing Designation Order* here limited the comparative coverage analysis to noncommercial facilities only. *See* 3 FCC Rcd at 4360; *see also Cabrini College*, 4 FCC Rcd 5462 (1989); *New York University*, 10 RR 2d at 217. In this respect also, the Board is legally bound by the *HDO*. *See supra* para. 7.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-355

In the Matter of

Potential Uses of Certain Orbital
Allocations by Operators in the
Direct Broadcast Satellite Service

REPORT AND ORDER

Adopted: April 24, 1991; Released: May 14, 1991

By the Commission:

1. This Order considers (1) the policies and requirements that will govern the permissible uses which can be made of Direct Broadcast Satellite (DBS) spectrum at certain satellite orbital positions and (2) the need for minimum geographic service requirements for DBS operators. A DBS operator is now assigned one channel at each of an eastern and a western orbital location[1] for each channel of service to be delivered nationally.[2] That channel of service can be delivered either by a pair of half-CONUS signals,[3] with the eastern part of the country served from the eastern orbital location and the western part from the western satellite location, or it can be delivered by a single full-CONUS signal delivered from the eastern orbital location.[4]

2. With full-CONUS delivery of a signal from an eastern position, the corresponding channel at the western position is not needed in order for an operator to deliver that channel of programming to the entire continental United States. Hence, concurrently with *Continental Satellite*, the Commission issued the subject *Notice of Proposed Rule Making* in MM Docket No. 89-355,[5] which sought comment on the policies that should govern the uses of DBS frequencies at western orbital locations when full-CONUS service was provided from corresponding eastern locations. Specifically, the *Notice* asked whether non-DBS uses should be permitted at such western orbital locations, and if so, whether delivery of such non-DBS services could or should be restricted to the DBS licensees assigned such channels for DBS service. The *Notice* also recognized the possibility that use of full-CONUS signals could eliminate or reduce the origination of DBS service from western orbital locations, which could, in turn, also reduce service to Alaska and Hawaii. Service to these states has been anticipated to originate from the orbital locations furthest west. Accordingly, the Commission also sought comment on whether DBS operators should be required to provide some level of service to Alaska and Hawaii or other specific geographically or politically defined regions of the United States.

3. Based on the record[6] in this proceeding, neither this Commission nor the parties themselves can predict the future configurations of DBS systems, including the nature and extent of use of full-CONUS signals. Consequently, any present actions based on such predictions would carry a substantial risk that they could foreclose or prejudice future developments in the provision of DBS service. Moreover, the nature and feasibility of possible alternative services that DBS operators would provide at western locations, and upon which any regulatory regimen would be premised, is unclear at this time. For these reasons, we will not formulate new policies for uses of western orbital locations at this point. We similarly find that a specific determination as to the nature and extent of minimum service levels for Alaska and Hawaii can be made only after the long-term characteristics of DBS system configurations and operations are demonstrated or can be confidently predicted.

SERVICE FROM WESTERN DBS ORBITAL LOCATIONS

4. *Comments:* Those parties that favor allowing alternative uses at western orbital locations (primarily existing DBS permittees) argue that such uses will encourage spectrum efficiency, diversification of service offerings, and investment in DBS, as well as provide additional revenues to DBS operators. Those opposing the change include terrestrial fixed service interests, fixed satellite service (FSS) interests, and the state of Hawaii. They argue, *inter alia*, (1) that it is inappropriate to authorize nonconforming uses when the viability of DBS is in serious doubt; (2) that terrestrial uses should take precedence over FSS uses if alternative uses of the spectrum are to be permitted; (3) that the FSS market would be harmfully disrupted if we permit FSS use of the DBS spectrum; and (4) that alternative uses from western orbital slots should not be permitted without first requiring service to Alaska and Hawaii.

5. *Resolution:* One DBS permittee, Advanced, believes that western DBS locations will remain an essential part of the DBS allocation, and we find its rationale compelling.[7] The practical value of full-CONUS service has yet to be tested. As Advanced states, it will take time to verify that "full-CONUS characteristics such as EIRP levels and 'single time-zone' programming" are feasible and marketable.[8] Thus, we further agree, it is unclear whether full CONUS delivery will be either permanently or exclusively required. Given this present uncertainty as to the extent to which full-CONUS delivery will prove viable, we find it prudent at this time to maintain the availability of DBS western orbital locations for DBS service. One DBS permittee proposing full-CONUS service, for example, is doing so only on an interim basis, until its second, western satellite is operational. In addition, some parties claim that the eastern orbital position of 61.5^0W cannot provide an adequate full-CONUS signal.[9] Consequently, a DBS operator assigned 61.5^0W as the eastern half of its pair might prefer to use a western location to provide half-CONUS DBS service in connection with DBS service from 61.5^0W, rather than using full-CONUS signals from 61.5^0W. Unrestricted use of the western orbital locations thus could discourage, rather than encourage, growth of DBS, particularly if western locations are necessary for nationwide coverage in the long run.[10] Moreover, allowing such alternative uses might increase the uncertainties facing the DBS operator, further retarding progress. In addition, we are also concerned that allowance of alternative uses might skew operators' decisions on system configuration, to the long-run detriment of DBS service.

6. On the other hand, we recognize that permitting alternative uses could, depending on technological developments, lessen some uncertainties, especially those related to venture risk, by providing additional sources of service. Moreover, permitting such uses could encourage DBS licensees to provide full services with the smallest amount of spectrum possible, furthering the Commission's long-standing goal of increasing spectrum efficiency. However, our existing policy with respect to non-conforming uses, which permits unrestricted non-conforming uses during the first license term and thereafter up to half of the use of each transponder, does provide DBS operators with significant flexibility to ease their entry into service and minimize their risk.[11] It thus would be imprudent for this Commission to authorize permanent non-DBS uses at western locations when it is possible that this action might prevent full development and nationwide availability of DBS service. Because of this, and because the outlines of this industry are as yet unsettled, we do not think that now is the time to establish rules concerning permanent alternative uses.

7. We also do not find the record clear enough on the nature of alternative services or the need for this spectrum to provide such services to reallocate previously allocated spectrum. One DBS permittee, Advanced, states that western locations will not afford an adequate full-CONUS signal and that "[a]t this time it is difficult to conceive of a useful service operating only to half-CONUS".[12] Hughes, on the other hand, foresees the "potential" for communications among west coast cities, Alaska and Hawaii; specialized digital services to business and government sites in the western United States, Alaska and Hawaii; and fiber optic cable back-up between CONUS and Alaska and between CONUS and Hawaii as possible alternative uses of DBS frequencies. [13] Other "options" suggested include MSS and delivery of cable network programming.[14] Hughes, which argues for permanent authorization of non-DBS services from western orbital positions, concedes that the nature of the services that can be provided from western orbital slots is as yet undetermined.[15] These potential benefits are simply too speculative to outweigh the other considerations here.

GEOGRAPHIC SERVICE REQUIREMENTS

8. *Comments:* The *Notice* raised the possibility that allowing full-CONUS DBS service from eastern positions and the proposal to permit alternative uses at western orbital locations might affect the extent of DBS service to Alaska and Hawaii. Hawaii filed comments objecting to proposed changes as likely to impair the provision of DBS service to that state. While acknowledging the significance of service to Alaska and Hawaii, many DBS permittees argue against adoption of service requirements, particularly on first-generation DBS satellites.

9. *Resolution:* This Commission is determined to ensure that DBS service is provided throughout the country, including Alaska and Hawaii. At the same time, however, we believe that it would be premature to now establish specific service requirements for Alaska and Hawaii, when, as discussed above, it is unclear that full-CONUS delivery will be either exclusive or permanent, and in light of our decision not to provide for non-DBS services at western orbital positions at this time. Moreover, we find the record inconclusive with respect to the ability of eastern orbital positions and the 148^{0}W and 157^{0}W western orbital positions to serve Alaska and Hawaii using conventionally modulated transmissions.[16] Digital modulation and compression techniques will likely alter the assumptions used in establishing Region 2 Plan parameters for avoiding harmful interference to neighboring countries, making the basis for a decision at this time even less certain.

10. For example, with respect to full-CONUS eastern service, two DBS permittees state that service to Alaska is feasible from 101^{0}W as all parts of the Soviet Union are below the horizon from that location.[17] They have not, however, addressed the possibility of interference with Canadian frequency assignments. [18] Two parties, Hawaii and Advanced, reach somewhat different conclusions with respect to maximum elevation angles produced and their suitability for service to Hawaii from the 110^{0}W eastern location.[19] It appears to us that the discrepancy results from a difference in the service areas projected. Hawaii appears to project service to the entire island chain; Advanced service to major population centers. Some parties state that full-CONUS 110^{0}W and 119^{0}W satellites can serve most of Alaska within the power flux density (PFD) limits of the Region 2 Plan for the 12.2-12.5 GHz band, but that for the 12.5-12.7 GHz band, agreement of the Soviet Union to exceed these limits may be required.[20]

11. The record generally is even more positive concerning service to Alaska and Hawaii from western locations. TEMPO, for example, believes that Alaskan service from these positions poses no problems with respect to compliance with Region 2 PFD 1 limits.[21] Advanced states that coverage of Alaska and Hawaii from western locations will be practical and that it plans to offer this service during half-CONUS paired operation from its allotted 148^{0}W position.[22] Hawaii contends that a signal originating from a western location is necessary to ensure viable access to DBS service in Hawaii.[23] Any calculations are dependent on assumptions regarding the operating characteristics of individual systems. Thus, it is difficult at this stage in the development of DBS to confirm stated results on the technical feasibility of service to Alaska and Hawaii for western locations other than 166^{0}W and 175^{0}W.

12. Assuming the technical feasibility of service to Alaska and Hawaii, industry plans are insufficiently crystallized to permit us to determine whether there is a need to mandate specific service requirements for these states. In addition, the effect of digital modulation and compression techniques on the harmful interference from satellite transmissions has not yet been assessed. Digital modulation disperses signal energy evenly throughout a given bandwidth. FM modulation, on which the Region 2 plan is based, disperses signal energy in continually changing patterns throughout the bandwidth, with all of the signal energy periodically concentrated near the carrier frequency. Artificial energy dispersal of FM signals reduces, but does not eliminate, this energy concentration. Therefore, the interference potential (and the interference resistance) of digitally modulated satellite transmission will likely be different from that of the conventional FM modulations assumed in establishing the parameters for the Region 2 Plan that were deemed necessary to provide adequate interference protection.[24] Calculations regarding potential DBS interference may thus be significantly altered if digital modulation is employed, with the possibility in some cases of reduction of interference to neighboring countries, thus further increasing the likelihood of successful service to Alaska and Hawaii from

locations other than 166^{0}W and 175^{0}W. Deferring decision on this matter should enable us to take into account the effects, if any, of digital modulation and compression on our analysis of the interference issues arising from attempts to serve Alaska and Hawaii from orbital locations other than 166^{0}W and 175^{0}W.

13. Although much evidence in the record suggests that service to Alaska and Hawaii will develop, industry plans and implementation of technological advances are not yet concrete enough to permit conclusive determinations on when and how it will develop. Notwithstanding this fact, however, we again emphasize this Commission's commitment to ensuring that DBS service is truly nationwide. We note that several DBS permittees have recognized the importance of service to Alaska and Hawaii. There is likely to be a significant amount of service from the western orbital positions, the locations with the greatest technical potential for reaching these states. We observe in this regard that some DBS permittees may prefer to use a western orbital location to complete their coverage of CONUS for some or all channels of service, thereby increasing the likelihood that western locations will be used for DBS service, and the likelihood that a portion of that coverage will be devoted to Alaska and Hawaii. As discussed above, digital modulation may alter assumptions about potential interference to neighboring countries, not only from the 148^{0}W and 157^{0}W positions, but also from eastern orbital locations. Moreover, the advent of digital modulation may increase channel capacity[25] and reduce channel cost to the point that it will be economically advantageous to target channels to ever narrowing audiences, such as the Alaska or Hawaii region. Thus, it appears likely that service to Alaska and Hawaii will evolve on its own. However, should it appear, as DBS develops, that Alaska and Hawaii will not be adequately served, we will not hesitate to revisit this issue, and consider, for example, conditioning any non-conforming uses from western DBS orbital locations on service to these states.[26]

CONCLUSIONS

14. For the reasons stated here, we are not now prepared to determine that the western DBS orbital locations should be made permanently available for the provision of non-DBS service. This decision may disappoint those DBS permittees who had hoped we would establish their ability to use for alternative purposes any spectrum they may make available through their efforts, without diminishing the supply of DBS service. Given the uncertainty surrounding DBS service at this time, however, we cannot calculate the total effect of such rules.

15. This issue can be revisited at a later time, of course, if and when it becomes appropriate. In the interim, we must point out that the current DBS permittees all filed applications with the express expectation of providing DBS service, and we have done nothing to alter or diminish the bases upon which such expectations presumably were founded. Some of those permits are now eight years old. We remain committed to our conviction that DBS has a significant role in serving this nation's future telecommunications needs. While we have consistently followed a flexible regulatory approach for DBS, we have not changed the primary allocations of the spectrum.[27] DBS entities can thus be certain that this allocation will remain until they are given full reasonable opportunity to establish DBS service, but if demand for such service is so limited that it cannot ultimately stand on its own, we may need to reconsider that spectrum allocation.

ADMINISTRATIVE MATTERS AND ORDERING CLAUSE

16. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

17. Pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980, it is hereby certified that because no rule or rule amendment is generated by this *Report and Order*, this decision will not have a significant impact on a substantial number of small entities.

18. The Secretary shall send a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act of 1980 (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq*, (1981)).

19. IT IS ORDERED THAT, pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, this proceeding IS TERMINATED.

20. Further information on this proceeding may be obtained by contacting Regina Harrison, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] There are 32 DBS frequency channels at each of eight orbital locations. 61.5^{0}W, 101^{0}W, 110^{0}W and 119^{0}W are referred to as the eastern locations. 148^{0}W, 157^{0}W, 166^{0}W and 175^{0}W are referred to as the western locations. While certain eastern locations may be able to deliver DBS signals to the entire continental United States, signals from western orbital positions appear unable to provide service to the eastern half of the country.

[2] Continental Satellite Corporation (*Continental Satellite*), 4 FCC Rcd 6292 (1989), *recon. denied*, 5 FCC Rcd 7421 (1990). In that decision, the Commission determined that to achieve maximum use of available DBS spectrum, it would prohibit the provision of western half-CONUS service from the "eastern" DBS orbital positions. At the same time, the Commission stated its intention to authorize full-CONUS signals from eastern locations on a conditional basis. 4 FCC Rcd at 6294.

[3] Signals covering half of the continental United States (CONUS) are referred to as "half-CONUS" signals. Those which cover the entire continental United States are referred to as "full-CONUS" signals.

[4] As noted in *Continental Satellite*, full-CONUS service does not reduce the power needs of an operator. Full-CONUS signals, which cover approximately twice as much area as half-CONUS signals, require roughly twice the power capacity of half-CONUS operation to maintain the same power flux density at points on the ground. 4 FCC Rcd at 6302 n. 11.

[5] *Notice of Proposed Rule Making*, 4 FCC Rcd 6306 (1989) (*Notice*).

[6] A total of 12 comments and 13 replies were filed. Lists of parties filing comments, reply comments and informal comments are contained in Appendix A. The Commission received the comments of Advanced Communications Corporation (Advanced) on October 16, 1989, three days after the filing deadline. We treat this pleading as an informal comment.

[7] Advanced Comments at 1-2. *Cf.* Comments of TEMPO Satellite, Inc. (TEMPO) at i, 6 (supporting designation of 166^0W and 175^0W to provide alternative services, and use of 157^0W and 148^0W for pairing with 61.5^0W).

[8] Advanced Comments at 1. Equivalent Isotropically Radiated Power (EIRP) is "[t]he product of the power supplied to the antenna and the antenna gain in a given direction relative to an isotropic antenna." 47 C.F.R. § 2.1. Given equivalent power levels, full-CONUS delivery results in EIRP levels approximately 3dB lower than half-CONUS delivery. Although it appears that when used with smaller dishes, such levels still yield acceptable quality signals, this assumption remains to be verified in practice. "'Single time zone' programming" refers to the fact that full-CONUS delivery sends a single signal over the entire continental United States, so that different time zones will receive the same program simultaneously, *i.e.*, at different local times of the day.

[9] TEMPO Comments at 6; Reply of Direct Broadcast Satellite Corp. at 2. Some parties argue that for 61.5^0W to be a viable slot, it must be paired with 148^0W or 157^0W. *See, e.g.*, TEMPO Comments at 6-8. This issue is beyond the scope of this proceeding.

[10] Because we do not authorize additional services, it is unnecessary to consider objections to specific alternative uses, such as mobile satellite service (MSS) or FSS, or the issues of whether to allow competing applicants for non-conforming uses or to continue terrestrial users' primary status over alternative services. In connection with this last question, we agree with Hughes Communications Galaxy, Inc. (Hughes) that regardless of the priority given to alternative uses at western orbital locations, full-CONUS DBS service from eastern locations is still entitled to protection from terrestrial fixed services throughout the country. Hughes Reply at 7. Thus, it is difficult to perceive the benefit which terrestrial users would derive from establishing primacy over non-DBS services originating from western DBS locations, since they would be secondary to any DBS service in the same area on the same channel. In any event, it is not necessary to resolve the issue at this time.

[11] *United States Satellite Broadcasting Co., Inc.*, 1 FCC Rcd 977, 979 (1986), *recon. denied*, 2 FCC Rcd 3642 (1987).

[12] Advanced Comments at 2.

[13] Hughes Comments at 4. Hughes, however, argues that it is premature for us to adopt specific technical limitations on alternative uses, as the nature of the services that can be provided are as yet undetermined. *Id.* at 4-5 and n. 7. As we decline to authorize alternative uses, it is unnecessary to address this argument on appropriate technical limitations.

[14] Reply Comments of the United States Satellite Broadcasting Co., Inc. at 5-7; Comments of the State of Hawaii (Hawaii) at 6-7 (although objecting to such use, observing that likely alternative use of DBS is for delivery of cable programming to terrestrial headends).

[15] Hughes Comments at 4 and n. 7.

[16] The Region 2 Plan specifically provides for service to Alaska and Hawaii from the western slots of 166^0W and 175^0W. International Telecommunications Union (ITU) Radio Regulations, App. 30 (Orb-85), Article 10 (Region 2 Plan).

[17] Hughes Reply at 5 n. 4; TEMPO Comments at 14.

[18] In addition, elevation angles for Alaska from this location appear to be quite low, from near 0 to 22, so that the feasibility of service to all parts of Alaska from 101^0W is questionable.

[19] Advanced Comments at 2-6; Hawaii Comments at 5.

[20] TEMPO Comments at 14; Hughes Reply at 5 n. 4. These locations also yield fairly low elevation angles (approximately 5 to 27) for Alaska. Also, these parties fail to address the potential for interference with Canadian frequency assignments by signals from these locations.

[21] TEMPO Comments at 14. TEMPO, however, assumes a 2 MHz energy dispersal peak-to-peak, as opposed to 600 KHz used in the Region 2 Plan.

[22] Advanced Comments at 2.

[23] Hawaii Comments at 6.

[24] ITU Regulations, App. 30 (Orb-85) Annex 5, Section 3.1.2.

[25] *See generally* "Satellite Special Report," Broadcasting 35 (July 30, 1990).

[26] Many parties with interests in various services, including operational fixed service, public safety, FSS, or with concerns about HDTV uses, urge various forms of reallocation or reservation of DBS spectrum. We first note that many of those that argue for a reduction in spectrum, *see, e.g.*, Comments of Network Equipment Division of the Telecommunications Industry Association at 3-4, on the basis that the DBS industry seems not to require all the allotted spectrum/orbit resource fail to recognize that a reduction in the number of orbital locations to be used in no way reduces the amount of spectrum to be used. The entire DBS spectrum is simply re-used at each orbital location. Were only one orbital location to be ultimately used for DBS, the entire 500 MHz of allotted spectrum would still be required to provide service from this one position, precluding terrestrial use of the entire spectrum. Thus, a reduction of spectrum is neither indicated by our recent actions or deliberations nor feasible. In addition, we decline to consider requests for a uniform 27 MHz channelization plan for DBS because these also are beyond the scope of the *Notice*. We observe that comments on use of the 12 GHz band, and 24 MHz Region 2 channeling plan for HDTV uses have been sought in connection with preparations for the 1992 frequency allocations conference. *An Inquiry Relating to Preparation for the International Telecommunication Union World Administrative Radio Conference for Dealing with Frequency Allocations in Certain Parts of the Spectrum*, Gen. Docket No. 89-554, 4 FCC Rcd 8546 (1989).

[27] Non-DBS uses are permitted during the start-up phase of a DBS service and throughout the life of first-generation satellites. This provision was adopted to increase early revenues to support the very high up-front costs of launching a DBS system and to provide a fallback position that would reduce the risk of loss on DBS satellites in the even DBS service proves unsuccessful. *See supra* note 11 and accompanying test. This is a temporary service exception available for all first-generation DBS satellites.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-136

In the Matter of

David R. Price

Licensee, Radio Station WOKJ(AM)
Jackson, Mississippi

Order to Show Cause Why the
License of Station WOKJ(AM),
Jackson, Mississippi, Should
Not Be Revoked

And

Notice of Forfeiture

ORDER TO SHOW CAUSE AND NOTICE OF FORFEITURE

Adopted: April 23, 1991; Released: May 14, 1991

By the Commission:

1. The Commission has before it for consideration: (a) the license of David R. Price for AM Radio Station WOKJ, Jackson, Mississippi; and (b) the results of the Commission's investigation into WOKJ's unlit antenna towers and its unauthorized silent status.

2. WOKJ has been off the air since at least July 20, 1990, the date that Mississippi Power and Light disconnected service for nonpayment. On the morning of July 20, upon notification from the power company, the Federal Aviation Administration (FAA) issued a "Notice to Airmen" (NOTAM), notifying pilots as to the existence, location, and indefinite duration of WOKJ's unlit towers. On August 8, the FAA informed the Commission's Field Operations Bureau (FOB) in New Orleans that WOKJ had not filed a report of a tower light outage with the FAA, that Mississippi Power and Light Company had notified the FAA that it suspended electrical service to WOKJ for nonpayment and that, as a result, WOKJ's six-tower array, at 390 feet above ground level, had not been illuminated during periods of darkness, in violation of FAA requirements and Part 17 of the Commission's Rules, since July 20, 1990. Upon receipt of the FAA report, the FOB made several unsuccessful attempts to reach the licensee, David R. Price, by telephone between August 13 and August 20, 1990. The FOB then sent a letter of inquiry, by certified mail, to Price on August 22, 1990, which, *inter alia*, directed a response within three days as to action taken to correct the air navigation hazard created by the unlit towers. Three weeks later, Price responded that he was attempting to sell the station, hoped the buyer would restore the tower lights, and would "make every effort to have this completed within one week."

3. Price made no further contact with the Commission. The Mass Media Bureau sent two successive inquiries, on September 18 and November 8, 1990, (the second by certified mail), requesting information about the unlit towers and the station's silent status. The licensee did not respond to either of these letters. On November 2, the FAA sent a letter to Price, advising him that WOKJ's unlit towers posed a hazard to air navigation, as the towers are in close proximity (2.49 nautical miles north) to the John Bell Williams Airport. The FAA's letter indicated that its finding would become final on December 12. On November 7, 1990, the FOB sent a Notice of Violation, finding the licensee in violation of Section 17.21(a) of the Commission's Rules, concerning the painting and lighting of antenna towers. The letter noted the results of the FAA study that the towers constituted a hazard to air navigation. The Notice of Violation also warned that if the licensee did not take immediate action to restore the lights on these towers, the Commission would initiate action to have the towers dismantled. Again, the licensee did not respond.

4. During the period December 19-21, 1990, the Mass Media Bureau, the FOB, and the Office of General Counsel contacted both the licensee and Mississippi Power and Light Company, urging the implementation of some emergency measures to immediately restore lighting to the towers. As a result, the power company agreed to provide power to light the towers if Price would undertake to made periodic installment payments to discharge his past and current obligations to Mississippi Power and Light. Price agreed and WOKJ's towers were illuminated on December 21, 1990. To date, the towers remain lit under that arrangement.

5. Both Section 303(q) of the Communications Act of 1934, as amended, and Section 73.1213 of the Commission's Rules[1] require that permittees and licensees implement and maintain the painting and/or illumination of radio towers, in accordance with Part 17. Section 17.21(a) requires that towers 200 feet above the ground be lit. Even if the station is silent, the towers must continue to be painted and lit.[2] Section 17.48 requires notification of extinguishment or improper functioning of lights; Section 17.51 requires the exhibition of lights from sunset to sunrise (unless otherwise specified); Section 17.56(a) requires replacement or repair of lights, automatic indicators, automatic control and alarm systems as soon as practicable. Here, until Commission staff intervened, the licensee had done nothing in the way of notifying either the Commission or the FAA, making the repairs, or responding to repeated Commission inquiries. Violations of antenna lighting rules are extremely serious because of potential dangers to aviation. *Oro Spanish Broadcasting Company, Inc.*, 5 FCC Rcd 833 (1990); *Radio Beaumont, Inc.*, 13 FCC 2d 965 (1968). In view of these facts, David R. Price is in apparent violation of Section 303(q) of the Communications Act of 1934, as amended, and Part 17 of the Commission's Rules.

6. With respect to the discontinuance of operation, Section 73.1740(a)(4) of the Commission's Rules requires that when a station discontinues operation for causes beyond its control, it inform the Commission no later than 10 days after the discontinued operation and, when the station remains silent for over 30 days, it obtain Commis-

sion authority to remain silent. [3] With respect to a station that plans permanent discontinuance of operations, Section 73.1750 requires the licensee to notify the Commission at least two days before the station is shut off and to forward its license to the Commission for cancellation immediately after permanent discontinuance. WOKJ has been off the air for over six months without any notification to, or authority from, the Commission. Moreover, WOKJ has not surrendered its license. Because of these facts, WOKJ is in apparent violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules. *See WGRI Radio, Inc.*, 2 FCC Rcd 5500 (1987).

7. In addition to the assorted technical violations, the licensee has also apparently violated Sections 1.89 and 73.1015 of the Commission's Rules. Section 1.89(b) requires an answer to a Notice of Violation within 10 days of receipt or such shorter time as may be indicated. In this instance, the Notice of Violation required an answer within three days. Price did not respond within that time period, or at any time since then. Section 73.1015 requires licensees to respond to Commission inquiries concerning "matter(s) within the jurisdiction of the Commission" and to do so without misrepresentation or "willful material omissions." Price has apparently ignored all Commission directives and inquiries concerning WOKJ since August.

8. Accordingly, IT IS ORDERED, That pursuant to Sections 312(a)(3) and (4) and 503(b) of the Communications Act of 1934, as amended, David R. Price is DIRECTED TO SHOW CAUSE why the license for Radio Station WOKJ(AM), Jackson, Mississippi, should not be REVOKED,[4] at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether David R. Price violated Sections 303(q) of the Communications Act of 1934, as amended, and Sections 73.1213, 17.21(a), 17.48, 17.51 and 17.56(a) of the Commission's Rules.

(b) To determine whether David R. Price violated Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules.

(c) To determine whether David R. Price violated Sections 1.89 and 73.1015 of the Commission's Rules.

(d) To determine, in light of the evidence adduced under the foregoing issues, whether David R. Price possesses the requisite qualifications to be or remain licensee of the captioned radio station.

(e) To determine, in light of the evidence adduced under the foregoing issues, whether David R. Price should be assessed a monetary forfeiture not to exceed $250,000 and, if so, in what amount.

9. IT IS FURTHER ORDERED, That pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding with the evidence and the burden of proof shall be upon the Mass Media Bureau as to all issues.

10. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, in person or by attorney, shall file with the Commission within ten (10) days of the receipt of the Order to Show Cause a written appearance stating that it will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file an appearance within the time specified, the right to a hearing shall be deemed to have been waived. Where a hearing is waived, a written statement in mitigation or justification may be submitted within fourteen (14) days of the receipt of the Order to Show Cause. *See* Section 1.92(a) of the Commission's Rules. In the event the right to a hearing is waived, the presiding officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate Order will be entered. *See* Section 1.92(c) and (d) of the Commission's Rules.

11. IT IS FURTHER ORDERED, that this hearing shall be conducted on as expedited a basis as due process, the Act and the Commission's Rules permit, given the hazard to air navigation resulting from the licensee's apparent malfeasance and nonfeasance described above.

12. IT IS FURTHER ORDERED, that in the event the licensee waives his right to a hearing, and the Mass Media Bureau enters an Order revoking the license for Station WOKJ(AM) under Section 1.92(d) of the Commission's Rules, or in the event that the hearing record warrants an Order revoking the license for Station WOKJ(AM), Jackson, Mississippi, the Commission, or the Mass Media Bureau shall issue an Order pursuant to Section 303(q) of the Communications Act, requiring the dismantling of the towers, pursuant to the determination of the Federal Aviation Administration that the towers constitute a hazard to air navigation.

13. IT IS FURTHER ORDERED, that whether or not it is determined that the hearing record warrants an Order revoking the license for Station WOKJ(AM), Jackson, Mississippi, it shall be determined if David R. Price willfully or repeatedly violated Sections 303(q) of the Communications Act and Sections 73.1213, 17.21(a), 17.48, 17.51, and 17.56(a) of the Commission's Rules. It shall also be determined if David R. Price willfully or repeatedly violated Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules, and Sections 1.89 and 73.1015 of the Commission's Rules. If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, and in what amount, not to exceed $250,000, for the willful or repeated violations of any or all of the above-cited provisions.

14. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended.

15. IT IS FURTHER ORDERED, That the Secretary of the Commission, send a copy of this Order by *Certified Mail-Return Receipt Requested* to:

David R. Price
Licensee of Radio Station WOKJ(AM)
611 Market Street
Port Gibson, Mississippi 39150

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 303(q) states that the Commission shall:

> Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescibed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is reasonable possibility that it may constitute a menace to air navigation.

Section 73.1213 of the Commission's Rules states:

> (a) The provisions of Part 17 of this chapter (Construction, Marking and Lighting of Antenna Structures), require certain antenna structures to be painted and/or lighted in accordance with the provisions of that part. (*See* §§ 17.47 through 17.56).
>
> (b) The licensee or permittee of an AM, FM, or TV broadcast station, if the sole occupant of the antenna and/or the antenna supporting structure, is responsible for conforming to the requirements of §§ 17.47 through 17.56 of this chapter.

[2] *See* n.4 below.

[3] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

[4] On March 28, 1991, Mr. Price filed an application to assign the license of station WOKJ. The disposition of that application will be held in abeyance pending the outcome of this proceeding. We also note that on April 5, 1991, Mr. Price filed an application to assign the license of station WKPG(AM), Port Gibson, Mississippi, of which he is also the 100% owner. That application will be processed and will not be conditioned upon the outcome of this proceeding. The Commission will consider at a later date what effect, if any, the outcome of this proceeding shall have on the status of KNEK(AM), Washington, Louisiana, the other station of which Mr. Price is the 100% owner. We do not anticipate acting on any application Mr. Price may file to acquire a broadcast station until the resolution of the instant proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BankAmerica Corporation,
The Chase Manhattan Corporation,
Citicorp, and MBNA
America Bank, N. A.,
Complainants,

v.

American Telephone &	File No. E-90-211
Telegraph Co.,	File No. E-90-212
AT&T Universal	File No. E-90-213
Card Services Corp.,	
and Universal Bank,	
Defendants.	

ORDER

Adopted: May 7, 1991; Released: May 15, 1991

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. This is a ruling on a motion filed by the complainants in the above-captioned proceeding to compel American Telephone and Telegraph Co. (AT&T) and AT&T Universal Card Services Corp. (AT&T/UCS) to answer interrogatories filed by complainants on October 15, 1990. The defendants have filed an opposition to the motion to compel.

2. The record reflects that, through informal negotiations, the parties have resolved all disputes regarding the interrogatories except for a disagreement over Interrogatory 5 (3) as revised by complainants.[1] That revised interrogatory requests AT&T and AT&T/UCS to provide "a schedule of all amounts of money, credit, goods, services, or other value or compensation...provided by or due from AT&T, AT&T/UCS, Universal Bank, or any affiliate of Universal Bank, to or on behalf of AT&T, AT&T/UCS, Universal Bank, or any affiliate of Universal Bank, in connection with the AT&T Universal Card venture."

3. Defendants object to revised Interrogatory 5 (3) on the ground that it is not likely to lead to relevant evidence because it requests information about payments "strictly between unregulated entities...." Defendants argue that cross-subsidies could only occur through an overpayment from or an underpayment to a regulated AT&T entity. Defendants argue, therefore, that payments among unregulated entities cannot possibly bear on the allegation of cross-subsidies and are beyond the Commission's jurisdiction in a Section 208 proceeding.

4. We will grant Complainants' motion to compel with respect to revised interrogatory 5 (3). AT&T's contention that the requested information is irrelevant is unpersuasive. Contrary to AT&T's assertions, it is conceivable that cross-subsidies could be achieved in a variety of ways, including through a series of financial transactions which flow through unregulated entities or third parties. Thus, payments between unregulated entities could be an essential link in a chain establishing an impermissible cross-subsidy. For these reasons, we are persuaded that the requested information is relevant or is reasonably calculated to lead to the discovery of admissible evidence and should be provided.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C. F. R. § 0.291, that AT&T is hereby directed to respond to Complainants' revised interrogatory 5(3) within twenty days of the effective date of this order.

6. IT IS FURTHER ORDERED that this order is effective upon adoption.[2]

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] After discussions among the parties, complainants revised their interrogatories, including the present formulation of interrogatory 5(3), by letter dated November 14, 1990. Defendants AT&T and AT&T/UCS commented on the revised interrogatories by letter dated November 20, 1990. Defendants subsequently filed a supplemental response to the interrogatories on December 5, 1990 which restated their objections to interrogatory 5(3).

[2] Counsel for the parties were notified by telephone of this ruling at 11:00 a.m. on May 7, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-65

In the Matter of

Policies and Rules Concerning
Interstate 900 Telecommunications
Services

ORDER

Adopted: April 24, 1991; Released: May 15, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On April 18, 1991, the Council on Audio Communication (COAC) filed a letter requesting that we extend the deadlines for filing initial comments and reply comments in the above-captioned proceeding to May 24 and June 24, 1991, respectively.[1] In support of its request, COAC states that it was organized after the *NPRM* was released, that the information requested by the Notice is extremely complex, and that the industry would be better represented and the public interest better served by the more complete response which it could file if the extension is granted.

2. It is the policy of the Commission that extensions of time shall not be routinely granted.[2] We are not persuaded by the circumstances presented that an extension of 30 days to file comments or reply comments is warranted. We believe that the comment periods contained in the *NPRM* provide interested parties sufficient time to study the implications of the Commission's proposals. Moreover, we do not wish to delay unnecessarily the expeditious resolution of this proceeding. Therefore, we are denying COAC's request for an extension of time.[3]

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C. F. R. § 0.291, that the request for extension of time filed by the Council on Audio Communications on April 18, 1991, IS DENIED.

4. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] In the Notice of Proposed Rule Making that initiated this proceeding, the Commission ordered that initial comments be filed by April 24, 1991, and that reply comments be filed by May 24, 1991. *Policies and Rules Concerning Interstate 900 Telecommunications Services:* Notice of Proposed Rule Making, CC Docket No. 91-65, FCC 91-72, para. 37 (released March 25, 1991) (hereinafter *NPRM*).

[2] *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[3] We note that COAC's request was not timely filed under Section 1.46(b) of the Rules, 47 C. F. R. § 1.46(b).That section requires that motions for extension of time to file comments and reply comments in response to a Notice of Proposed Rulemaking be filed at least 7 days before the filing date. In such case, where the motion is denied, comments or replies, as the case may be, need not be filed until 2 business days after the Commission acts on the motion. Since COAC's request was not timely filed, the established filing date for initial comments is unaffected. We further note, however, that Section 1.46(b) also allows parties to file motions for acceptance of late-filed comments.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-249

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Waldron, Arkansas)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 1, 1991; Released: May 15, 1991

By the Chief, Policy and Rules Division:

1. The Commission herein reconsiders a *Report and Order* ("R&O"), 5 FCC Rcd 958 (1990), issued in the above proceeding,[1] denying the reclassification of Station KRWA-FM, Channel 276A, Waldron, Arkansas to Channel 276C3 and modification of the license issued to Good News Broadcasting Corporation ("Good News") accordingly.[2] Reconsideration is sought by Good News and Waldron Community Broadcasting Corporation ("WCBC") (jointly referred to as "petitioners"), the proposed assignee of Station KRWA-FM.[3]

2. The Commission issued a *Notice* seeking comments on the proposal to substitute, *inter alia*, Channel 276C3 for Channel 276A at Waldron and to modify the license of Station KRWA-FM. The Commission did not timely receive comments from Good News or any other interested party,[4] and consistent with our policy and procedures set forth in the Appendix to the *Notice*, we refrained from modifying Station KRWA-FM to Channel 276C3. *See R&O, supra.*

3. In their petition for reconsideration, petitioners note that they filed comments after the adoption, but before the release, of the *R&O*. These comments stated the intent of the incumbent licensee of Station KRWA-FM to apply for authority to construct and operate Station KRWA-FM on Channel 276C3 if allotted.[5] In the comments, Good News states that although a copy of the *Notice* was to have been served upon Station KRWA-FM, no record of having received the *Notice* exists, as evidenced in a declaration of Chester A. Coco, President of Good News. Therefore, Good News asserts that it was unaware of its obligation to file comments to support the proposed modification of Station KRWA-FM.

4. In consideration of the above, and in the absence of any objection to the proposal, we believe the public interest would be served by substituting Channel 276C3 for Channel 276A at Waldron, Arkansas, since it could provide an expanded coverage area FM service to the community. Inasmuch as Channel 276C3 would have been substituted for Channel 276A earlier had it not been for the lack of an expression of interest, we believe that a reversal of our earlier denial of the proposed modification of Station KRWA-FM at Waldron is warranted. Acceptance of late filed expressions of interest is permissible in circumstances in which, as here, there is no opposition to the proposal and where there would be no adverse impact on another pending proposal. *See Alamogordo, New Mexico*, 5 FCC Rcd 7407 (1990). Therefore, the joint petitioners' request for reconsideration will be granted.

5. In view of the above, and in accordance with the provisions of Section 1. 420(g) of the Commission's Rules, we are modifying the license of Good News Broadcasting Corporation for Station KRWA-FM at Waldron, Arkansas, to specify operation on Channel 276C3 as proposed in the *Notice*. Channel 276C3 can be allotted to Waldron at the licensed site of Station KRWA-FM [6] in conformity with the Commission's Rules.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 27, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Waldron, Arkansas	276C3

7. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Good News Broadcasting Corporation and Waldron Community Broadcasting Corporation IS GRANTED.

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Good News Broadcasting Corporation for Station KRWA-FM, Waldron, Arkansas, IS MODIFIED to specify operation on Channel 276C3 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b)Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c)Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The Commission, on its own motion, issued a *Notice of Proposed Rule Making* ("*Notice*"), 4 FCC Rcd 4904 (1989), proposing to amend the FM Table of Allotments for 149 communities by reclassifying to Class C3 the Class A allotments for the stations listed in the *Notice* and modifying their authorizations accordingly. Station KRWA-FM, Channel 276A at Waldron, Arkansas, was one of those proposals.

[2] Although Good News is the licensee of Station KRWA-FM, an assignment of the license to Waldron Community Broadcasting Corporation ("WCBC") was granted March 8, 1990. The sale of the Station KRWA-FM has not been consummated. According to Good News, the assignee's obligation to consummate the sale is conditioned upon the successful outcome of this proceeding.

[3] Public Notice of the petition was given March 20, 1990, Report No. 1812.

[4] The Federal Aviation Administration ("FAA") filed comments concerning this docket as well as other dockets initiated simultaneously in response to the *Notice*. The FAA's concerns will be treated consistent with the treatment afforded in other proceedings. *See* 5 FCC Rcd 2152, n.4.

[5] These comments, which also advise us of the recent assignment of the license of Station KRWA-FM from Good News to WCBC, were accompanied by a request for leave to file. The Commission's Rules do not contemplate the filing of pleadings beyond the comment period unless specifically requested. However, in this instance, the acceptance of the comments would have no adverse impact on any other pending proposal. The comments merely reaffirm the joint petitioners' continuing interest in pursuing the modification proposal. Therefore, we believe the acceptance of the late-filed comments will serve the public interest since it would provide for the implementation of improved service to the residents of Waldron and the surrounding area without further delay.

[6] Coordinates at the licensed site of Station KRWA-FM are 34-51-44 and 94-04-26.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-188

In the Matter of

Amendment of Section 73.202(b), RM-6936
Table of Allotments,
FM Broadcast Stations.
(Santa Rosa and Tucumcari,
New Mexico)[1]

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 1, 1991; Released: May 15, 1991

By the Chief, Allocations Branch:

1. By *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), the Commission, on its own motion, proposed the substitution of Channel 240C3 for Channel 240A at Santa Rosa, New Mexico, and the modification of Don R. Davis' ("Davis") construction permit for Station KHWY to specify the higher powered channel. In response, Davis submitted a counterproposal requesting the substitution of Channel 241C1 for Channel 240A and the reallotment of Channel 241C1 from Santa Rosa to Tucumcari, New Mexico. In addition, Davis requested the modification of Station KHWY's construction permit to specify Tucumcari as the community of license.[2] The Federal Aviation Administration ("FAA") also filed comments.

2. By letter dated February 8, 1991, the Commission cancelled Davis' construction permit for Station KHWY for failure to construct within the required time period and deleted the station's call letters. No reconsideration of that action was filed. Therefore, because there is no longer a permittee which can apply for either Channel 240C3 at Santa Rosa or Channel 241C1 at Tucumcari, we will dismiss the rule making.

3. Accordingly, IT IS ORDERED, That the Commission proposal to substitute Channel 240C3 for Channel 240A at Santa Rosa, New Mexico, and Davis' counterproposal to substitute Channel 241C1 for Channel 240A and reallot Channel 241C1 from Santa Rosa to Tucumcari, New Mexico (RM-6936), ARE DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The community of Tucumcari has been added to the caption.

[2] Public Notice of the filing of the counterproposal was given on August 18, 1989, Report No. 1791.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-482

In the Matter of

Amendment of Section 73.202(b), RM-7172
Table of Allotments,
FM Broadcast Stations.
(Lemoore and Tipton, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 1, 1991; Released: May 15, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 6542 (1990), issued in response to a petition filed on behalf of Lemoore Wireless Co., Inc. ("petitioner"), licensee of Station KQYZ(FM), Channel 285A, Lemoore, California, proposing the allotment of its channel to Tipton, California, as a Class B1 channel, and modification of its license accordingly. Petitioner filed comments reiterating its intention to apply for Channel 285B1, if allotted to Tipton. No other comments were received.

2. We believe the public interest would be served by reallotting Channel 285A from Lemoore to Tipton, California, and by modifying the license of Station KQYZ(FM) to specify operation on Channel 285B1, as requested. Our determination is premised on the petitioner's showing that the reallotment to Tipton will result in a preferential arrangement of allotments. Tipton (population 1,185),[1] will be provided with a first local aural transmission service, while Lemoore (population 8,832) will continue to receive local aural transmission service from Station KJOP(AM).[2] Furthermore, the reallotment will not result in the relocation of a station from a rural to a larger urban area. Thus, in accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will modify the license for Station KQYZ(FM) to specify operation on Channel 285B1 at Tipton, California, in lieu of its present use on Channel 285A at Lemoore, California.

3. As indicated in the *Notice*, Channel 285B1 can be allotted to Tipton at the petitioner's suggested site, located 15.5. kilometers (9.7 miles) west of the community.[3]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 27, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Lemoore, California	--
Tipton, California	285B1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Lemoore Wireless Co., Inc. for Station KQYZ(FM), IS MODIFIED effective **June 27, 1991,** to specify operation on Channel 285B1 at Tipton, California, in lieu of Channel 285A at Lemoore, California, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Population figures were taken from the 1980 U.S. Census.

[2] Although Station KQIQ(AM) was also licensed to the petitioner at Lemoore, the authorization was cancelled, effective August 14, 1990, at the licensee's request.

[3] Coordinates used for Channel 285B1 at Tipton are 36-02-58 and 119-29-08.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-137

In the Matter of

Amendment of Section 73.202(b), RM-7494
Table of Allotments,
FM Broadcast Stations.
(Saltville, Virginia and
Jefferson, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 1, 1991; Released: May 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by 106.1, Inc. ("petitioner"), permittee of Channel 291A, Saltville, Virginia, requesting the reallotment of its channel to Jefferson, North, Carolina, as a Class C3 channel and modification of its construction permit to specify Jefferson as its community of license. Petitioner states that it will apply for Channel 291C3 if allotted.

2. Petitioner submits that under the provisions of Section 1.420(i) of the Commission's Rules, the reallotment of Channel 291C3 to Jefferson will result in a preferential arrangement of allotments. Jefferson currently has no local aural transmission service, whereas Station WXMY(AM) is licensed to Saltville. Petitioner is the permittee of what would be the first FM station, and second aural transmission service, in Saltville. According to the 1980 U. S. Census, Jefferson, North Carolina has a population of 1,086 persons and Saltville, Virginia, has a population of 2,376 persons. Petitioner points out that at the C3 allotment site at Jefferson, 91,654 persons would receive service within the 1.0 mV/m contour, while Channel 291A at Saltville will have only 26,574 persons within the 1.0 mV/m contour. An additional benefit of its proposal, according to the petitioner, is that the reallotment of 291C3 to Jefferson would eliminate a Saltville to Bluefield, Virginia, short-spacing restriction, thus allowing Station WBDY(FM), Channel 292A, Bluefield, Virginia, the freedom, if it so chose, to operate at maximum Class A facilities.

3. Channel 291C3 can be allotted to Jefferson in compliance with the Commission's minimum distance separation requirements with a site restriction of 1 kilometers (1.9 miles) north of the community to accommodate the petitioner's desired site.[1] The use of the site restriction does not obviate the spacing conflicts with two pending applications for vacant but now applied for Channel 290A at Colonial Heights, Tennessee, filed by Murray Communications ("Murray") (BPH-900220MM) and Evelyn Holt Parker ("Parker") (BPH-900220MN). However, as is Commission policy, rule making proposals which provide new service benefits are generally preferred over an application which represents a preference for a particular site. *See Andalusia, Al,* 49 FR 32201, August 13, 1984, *Las Vegas, NV,* 51 FR 9453 March 19, 1986. Therefore, a copy of this *Notice of Proposed Rule Making* will be served on Murray and Parker to advise the applicants that they may be required to amend their applications to specify a nonconflicting site, in the event that Channel 291C3 is ultimately allotted to Jefferson.

4. We believe the proposal warrants further consideration. The proposal would not deprive Saltville of its only local broadcast service and the use of Channel 291C3 at Jefferson is mutually exclusive with its present allotment of Channel 291A at Saltville. As requested, we also propose to modify petitioner's construction permit to specify operation on the higher powered channel and to specify Jefferson as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 291C3 at Jefferson or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Saltville, Virginia	291A	--
Jefferson, North Carolina	--	291C3

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. IT FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the following applicants for 290A at Colonial Heights Murray Communications, 1028 Woodstone Drive, Colonial Heights, Tennessee 37663; and Evelyn Holt Parker, 428 Highridge Road, Kingsport, Tennessee 37660.

8. Interested parties may file comments on or before **July 5, 1991,** and reply comments on or before **July 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dale Hendrix
920 Kirkwood
Aurora, Missouri 65605
(Petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of*

the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 291C3 at Jefferson are North Latitude 36-27-00 and West Longitude 81-29-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-126

In re Applications of

DARRELL SPANN File No. BR-881003YH

For Renewal of License of
Station WSVE(AM),
Jacksonville, Florida

SPICECOM BROADCASTING, INC. File No. BP-890103AC

For A Construction Permit
For a New AM Station
Jacksonville, Florida

HEARING DESIGNATION ORDER

Adopted: April 10, 1991; Released: May 23, 1991

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration the above-captioned mutually exclusive applications of Darrell Spann[1] ("Spann") for renewal of license for Station WSVE(AM), Jacksonville, Florida, and Spicecom Broadcasting, Inc. ("Spicecom") for a construction permit for a new AM station on 1280 kHz, the frequency presently occupied by WSVE(AM).

2. Spicecom's application specifies the technical facilities of WSVE(AM). In *First Report and Order in BC Docket 81-742 (Prevention of Abuses of the Renewal Process)* ("*First Report and Order*"), 4 FCC Rcd 4780, 4788-89 (1989), the Commission announced that it will no longer presume that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding. The Commission further stated that the policy change would be applied to applications pending on the effective date of the *First Report and Order*, as was Spicecom's application, as well as to all prospective applicants. Such applicants were directed to amend their applications to show reasonable assurance of site availability, or specify different facilities. 4 FCC Rcd at 4789. Spicecom has not amended its application.[2] Thus, and in accordance with the *First Report and Order*, at 4789, a site availability issue will be specified.

3. In Section III of its application, Spicecom responded negatively when asked to certify that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. Although the policy has since changed, when Spicecom filed its application the prevailing policy was to accept such applications and specify a financial qualifications issue to be resolved at hearing. *See Revision of FCC Form 301*, 4 FCC Rcd 3853, n. 71 (1989). Thus, an appropriate issue will be specified. *Revision* at 3861.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(1) To determine whether Spicecom has reasonable assurance that the transmitter site specified will be available to it;

(2) To determine whether Spicecom is financially qualified;

(3) To determine which of the proposals would, on a comparative basis, better serve the public interest; and

(4) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That, a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of an opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Stuart B. Bedell, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The subject renewal application was filed by Willis & Sons, Inc., then the licensee of WSVE(AM). Since then, Darrell Spann has become the licensee, pursuant to consummation of an earlier-approved assignment of the license (BAL-870226EB).

[2] On September 29, 1989, counsel for Willis & Sons, Inc., then licensee of WSVE(AM), filed a letter with the Commission, which indicated that Willis & Sons, Inc. had not granted Spicecom permission to specify its site. The letter showed service of a copy to counsel for Spicecom. It is not necessary for the Commission to determine at this time whether the present licensee of WSVE(AM) shares the sentiments expressed in the letter. The *First Report and Order* places the burden upon pending applicants to show that the incumbent's site is available. 4 FCC Rcd 4789. The applicant here has not made such a showing.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-125

In re Applications of

WILLIS BROADCASTING CORPORATION — File No. BR-881130XS

For Renewal of License of
Station WTJH(AM),
East Point, Georgia

STEVEN J. NEWMAN — File No. BP-890301AD

For A Construction Permit
For a New AM Station
East Point, Georgia

HEARING DESIGNATION ORDER

Adopted: April 10, 1991; Released: May 15, 1991

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration the above-captioned mutually exclusive applications of Willis Broadcasting Corporation[1] ("Willis") for renewal of license for Station WTJH(AM), East Point, Georgia, and Steven J. Newman ("Newman") for a construction permit for a new AM station on 1260 kHz, the frequency presently occupied by WTJH(AM).

2. Newman's application specifies the technical facilities of WTJH(AM). In *First Report and Order in BC Docket 81-742 (Prevention of Abuses of the Renewal Process)* ("*First Report and Order*"), 4 FCC Rcd 4780, 4788-89 (1989), the Commission announced that it will no longer presume that an incumbent's transmitter site would be available to a successful challenger in a comparative renewal proceeding. The Commission further stated that the policy change would be applied to applications pending on the effective date of the *First Report and Order*, as was Newman's application, as well as to all prospective applicants. Such applicants were directed to amend their applications to show reasonable assurance of site availability, or specify different facilities. 4 FCC Rcd at 4789. Newman has not amended its application.[2] Thus, and in accordance with the *First Report and Order*, at 4789, a site availability issue will be specified.

3. In Section III of its application, Newman responded negatively when asked to certify that sufficient net liquid assets are on hand or that sufficient funds are available from committed sources to construct and operate the requested facilities for three months without revenue. Although the policy has since changed, when Newman filed his application the prevailing policy was to accept such applications and specify a financial qualifications issue to be resolved at hearing. *See Revision of FCC Form 301*, 4 FCC Rcd 3853, n. 71 (1989). Thus, an appropriate issue will be specified. *Revision* at 3861.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. ACCORDINGLY, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent *Order*, upon the following issues:

(1) To determine whether Newman has reasonable assurance that the transmitter site specified will be available to him;

(2) To determine whether Newman is financially qualified;

(3) To determine which of the proposals would, on a comparative basis, better serve the public interest; and

(4) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That, a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of an opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this *Order*, file with the Commission, in triplicate, a WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this *Order*.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give NOTICE of the hearing within the time and in the manner prescribed, and shall ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Stuart B. Bedell, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The subject renewal application was filed by Inspirational Broadcasting Corporation, then the licensee of WTJH(AM). Since then, Willis Broadcasting Corporation, the 100% shareholder of Inspirational Broadcasting Corporation, has become the licensee, pursuant to consummation of a *pro forma* assignment of the license (BAL-891206EA).

[2] On September 29, 1989, counsel for Inspirational Broadcasting Corporation, then licensee of WTJH(AM), filed a letter with the Commission, which indicated that Inspirational Broadcasting Corporation had not granted Newman permission to specify its site. The letter showed service of a copy to counsel for Newman. It is not necessary for the Commission to determine at this time whether the present licensee of WTJH(AM) shares the sentiments expressed in the letter. The *First Report and Order* places the burden upon pending applicants to show that the incumbent's site is available. 4 FCC Rcd 4789. The applicant here has not made such a showing.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1084 **Released: May 15, 1991**

PETITION FOR DECLARATORY RULING TO CLARIFY COMMISSION'S PREEMPTION OF LOCAL ZONING OF SATELLITE EARTH STATIONS

The Satellite Broadcasting and Communications Association of America (SBCA) has filed a Petition for Declaratory Ruling (*Petition*) requesting clarification of the Commission's order in *Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations* 51 Fed. Reg. 5519 (February 14, 1986), 59 Rad. Reg. 2d (P&F) 1073 (1986). SBCA's *Petition* requests the following:

1) That the Commission clarify that its existing rules preempt local ordinances that effectively ban all antenna facilities;

2) That the Commission specify the types of regulations that are prima facie unreasonable under its rules;

3) That the Commission establish procedures to entertain petitions for emergency relief where local authorities threaten to enforce an ordinance patently inconsistent with Commission rules;

4) That the Commission initiate a rulemaking to amend certain rules governing the issuance of cease and desist orders in zoning preemption cases;

5) That a timetable be instituted to expedite Commission action on requests for cease and desist orders against local authorities in zoning preemption cases.

Comments or oppositions filed in response to SBCA's *Petition* are due on or before **July 12, 1991** and replies are due on or before **August 12, 1991.** Copies of the petition can be obtained in the Domestic Facilities Division Public Reference Room, Room 6220, 2025 M Street, N.W., Washington, D.C. or by contacting Downtown Copy Center, 1114 21st St., N.W., Washington, D.C., (202) 452-1422. For further information contact Rosalee Chiara, (202) 634-1718.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-28

In re Applications of

EDWARD ROYCE STOLTZ, II, tr/as ROYCE INTERNATIONAL BROADCASTING
Station KWOD-FM
Sacramento, California

File No. BRH-830719BD

For Renewal of License

WONG COMMUNICATIONS LIMITED PARTNERSHIP
Sacramento, California

File No. BPH-831031AY

For Construction Permit for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1991; Released: May 16, 1991

By the Commission:

1. In this proceeding, the Commission denied review of a Review Board decision granting Royce International Broadcasting's application for renewal of KWOD-FM in Sacramento, California, and denying Wong Communications Limited Partnership's mutually exclusive application for a construction permit. *Royce International Broadcasting*, 4 FCC Rcd 7139 (Rev. Bd. 1989), *rev. denied*, 5 FCC Rcd 7063 (1990). Wong now asks the Commission to reconsider its action.[1] We deny Wong's petition for the reasons that follow.

I. THE DECISIONS BELOW

2. The Board found Royce superior to Wong under the Commission's comparative renewal criteria. According to the Board, KWOD-FM's broadcast record during the pertinent license term was substantial and warranted a renewal expectancy. 4 FCC Rcd at 7144 ¶ 26. Additionally, the Board refused to credit Wong's organization as a limited partnership controlled by its 60 percent owner Fay Gum Wong. *Id.* at 7146 ¶ 37. Wong claims entitlement to 100 percent credit for integration of ownership into management based on Ms. Wong's proposed role as general manager. Wong also claims diversification credit for the fact that Ms. Wong owns no other media interests. The Board found that the partnership was actually controlled by Ms. Wong's brother, Kin Shaw Wong, who is nominally the partnership's 40 percent limited partner. The Board held that Royce was comparatively superior to Wong because of its renewal expectancy and, given the rejection of Wong's ownership structure, because of preferences for integration and diversification. *Id.* at 7146 ¶¶ 39-40.

3. The Commission agreed with the Board's resolution of this case. In so doing, we specifically discussed the basis for rejecting Wong's organization as a limited partnership.[2] As to Wong's proposal, we found that the record evidence showed that Mr. Wong, the purported limited partner, clearly has been and will likely remain the dominant principal in Wong. 5 FCC Rcd at 7063 ¶¶ 2-3. Moreover, we found that Ms. Wong's essentially passive role undermines the reliability of her claim that she will wield management authority. Thus, we concluded that Wong failed to meet its burden of demonstrating that its proposals were bona fide and entitled to any integration credit. *See KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8, 292-93 n.11 (1985).

4. Because of the recurring nature of the problem illustrated by Wong's competing application -- that of unreliable integration proposals -- the Commission took the opportunity to make a comprehensive statement regarding the evaluation of such proposals. 5 FCC Rcd at 7063 ¶¶ 4-6. In some respects, we restated existing case law, but we also adopted certain refinements that were logical outgrowths of prior precedent. We observed that our examination of the principles involved in evaluating defective integration proposals led us to conclusions about how these proposals should be dealt with that may be somewhat stricter than the approach that has been taken in some past cases.[3] Nonetheless, we noted that "[n]othing in this re-evaluation, however, changes the result in this case." *Id.* at 7064 n.4.

5. The Commission stated that cases like this one raise the question of whether an applicant's nominally active principals might not, in fact, be exercising control over the applicant at all, and whether the applicant thus should not receive any integration credit. 5 FCC Rcd at 7064 ¶ 10. We explained, in pertinent part, that the ownership and control of the applicant may be shown to be fatally uncertain because: (1) a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs; or (2) the assertedly active principal has exercised little, if any, significant control over the applicant and has not shown any real prospect of doing so.

6. Applying the foregoing principles to this case, we found that Kin Shaw Wong, Wong's purported limited partner, conspicuously dominated the applicant's affairs despite his disclaimers to the contrary. 5 FCC Rcd at 7064 ¶ 11. In addition, we found that Fay Wong, the purported general partner, was little more than the instrument of her brother's strategic plan for the Sacramento broadcast market. We considered Wong's proposal fundamentally unreliable and denied all integration credit to Wong.

II. PETITION FOR RECONSIDERATION

7. Wong contends that the Commission adopted new standards in this case and that it should not have applied these standards for evaluating defective integration proposals to Wong's proposal. In Wong's view, it would be unfair to apply restrictions on granting integration credit to a limited partnership formed before the restrictions were announced. Wong asserts that such retroactive ap-

plication would impose an undue hardship and would abridge Wong's legitimate reliance on former policy. Wong also characterizes the Commission's current approach to defective integration proposals as a "per se" rule that ignores the totality of the record evidence. Specifically, Wong faults the Commission for focusing on Mr. Wong's initiation of the application, while ignoring Ms. Wong's later involvement in and control of the prosecution of the application.

8. Royce responds that the Commission's action presents no problem of retroactive application. According to Royce, the Commission's analysis of Wong's application under the newly-enunciated standards is the same as that under long-standing precedent. Thus, the Commission's analysis does not dispose of Wong's proposal under a novel standard retroactively applied. Royce contends that Wong merely disagrees with the Commission's legal analysis, which does not constitute valid grounds for reconsideration.[4] In any event, Royce urges that its renewal expectancy would be decisive even if the Commission reversed its treatment of Wong's integration proposal.

9. We agree with Royce that this case presents no problem of retroactivity. Our general reevaluation of defective integration proposals did not affect the manner in which Wong's proposal was analyzed in any material respect. 5 FCC Rcd at 7064 n.4. Rather, as applied to the facts of this case, our statement of principles merely restated and refined existing law. *See id.* at 7063 ¶¶ 2-3, 7064 ¶ 11. A limited partnership, such as Wong, in which the limited partner exercises conspicuous control and the general partner is notably passive is entitled to no credit even under precedent adopted before the policy refinements announced in this proceeding. *See KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8, 292-93 n.11 (1985). Thus the outcome in either case was the same, and this proceeding presented no question of retroactive application of a new legal standard. To the extent that Wong maintains that the Commission's analysis did not correctly take into account the facts of this case, Wong merely reiterates arguments that we have already rejected. It is well settled that the Commission will not grant reconsideration for the purpose of reviewing matters that it has already considered. *See WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).[5]

III. ORDER

10. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed December 28, 1990 by Wong Communications Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are pending: (1) a Petition for Reconsideration filed December 28, 1990 by Wong Communications Limited Partnership; and (2) an opposition filed January 10, 1991 by Royce International Broadcasting.

[2] In its petition for reconsideration, Wong faults the Commission for not discussing other issues raised in Wong's application for review. The Commission may, however, as it chose to do in this case, deny review without discussion. 47 C.F.R. § 1.115(g).

[3] The Commission is not required to deal with all cases at all times as it has dealt with some that seem comparable. *FCC v. WOKO*, 329 U.S. 223, 228 (1946). The Commission may change its policies provided that it gives a reasoned explanation for doing so. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[4] Royce points out that under 47 C.F.R. § 1.115(g) petitions for reconsideration of rulings denying applications for review must rely on new facts or changed circumstances to be considered. Royce, therefore, asserts that Wong's petition should be dismissed.

[5] Additionally, we agree with the Board that Royce's renewal expectancy would be decisive even if Wong's comparative proposal were given the credit for integration and diversification that Wong seeks. *See* 4 FCC Rcd at 7144 ¶ 28, 7146 ¶ 40.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-311

In re Applications of

MARC A. ALBERT	File No. BPH-870918MC
TAYLOR COMMUNICATIONS OF SYRACUSE, INC.	File No. BPH-870918ML
SALT CITY COMMUNICATIONS INC.	File No. BPH-870918MN
HUSTON TELECOM, INC.	File No. BPH-870918MX
D.J.'S BROADCASTING CO.	File No. BPH-870918MY

For Construction Permit for
New FM Station, Channel 290A
Syracuse, New York

ORDER

Adopted: May 3, 1991; Released: May 16, 1991

By the Commission:

1. In his *Memorandum Opinion and Order*, FCC 90M-3622 (released Nov. 15, 1990), Chief Administrative Law Judge Joseph Stirmer granted a Motion for Summary Decision, adversely resolved the financial qualifications issue against Huston, and dismissed its application from the above-captioned proceeding. The Review Board affirmed. *Marc A. Albert*, 6 FCC Rcd 13 (1991). Now before the Commission is an Application for Review, filed January 31, 1991, by Huston Telecom, Inc., and Oppositions, filed on February 12, 1991 by D.J.'s Broadcasting Company, on February 15, 1991 by the Mass Media Bureau, and on February 15, 1991 by Marc Albert. We agree with the Board's resolution of this matter. *Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991).

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 1.115(g) of the Commission's rules, the Application for Review filed January 31, 1991, by Huston Telecom, Inc. IS DENIED.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-355

In re Applications of

TRI-STATE BROADCASTING COMPANY, INC. Station KUKQ(AM) Tempe, Arizona — File No. BR-830609UH

For Renewal of License

Jack F. Grimm, Jackie B. Grimm & Ruth G. Clifford d/b/a GRIMM & CLIFFORD — File No. BP-830831AB

For Construction Permit for New AM Facility at Tempe, Arizona

TRI-STATE BROADCASTING COMPANY, INC. Station KPUD-FM Tempe, Arizona — File No. BRH-830609WZ

For Renewal of License

Jack F. Grimm, Jackie B. Grimm & Ruth G. Clifford d/b/a GRIMM & CLIFFORD — File No. BPH-830831AI

For Construction Permit for New FM facility at Tempe, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 1991; **Released: May 16, 1991**

By the Commission:

1. Before the Commission is a decision of the Review Board denying Tri-State Broadcasting Company, Inc. renewal of stations KUKQ(AM) and KUPD-FM in Tempe, Arizona, and granting the mutually exclusive applications of Grimm & Clifford.[1] *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156 (Rev. Bd. 1990), *recon. denied*, 5 FCC Rcd 3727 (Rev. Bd. 1990). *See also Tri-State Broadcasting Co., Inc.*, 3 FCC Rcd 4847 (I.D. 1988). The Board found Tri-State unqualified to be a Commission licensee because it made misrepresentations and lacked candor before the Commission. We agree with the Board's resolution of this proceeding. We wish, however, to comment on certain matters.

2. The issues in this case arise from the circumstances surrounding the acquisition of KUKQ(AM) and KUPD-FM by Tri-State's current owners, John N. Norris, III, and Robert L. Melton. In 1974, Norris and Melton (each as a prospective 50 percent owner) sought assignment of the stations from the stations' receiver. 3 FCC Rcd at 4877 ¶ 19. At the time, Melton was serving as the stations' general manager, as he had for several years. *Id.* at 4875 ¶ 9. The Commission's staff informed Norris and Melton that it objected to Melton's involvement in the proposed assignment, since recent investigations of the stations had disclosed technical violations and log falsifications, for which Melton was held culpable.

3. The parties to the assignment application then informed the Commission that Melton had been terminated as the stations' general manager and that he had been deleted as a proposed stockholder of the stations. 3 FCC Rcd at 4879 ¶ 34. They told the Commission that an individual named Barry Leverant would be the stations' new general manager and that Melton would remain on the stations' staff as a salesman. The Commission approved the transfer of the stations to Tri-State as 100 percent-owned by Norris on December 24, 1974. 5 FCC Rcd at 1158 ¶ 13.

4. In 1978, Norris wrote the Commission that he considered Melton to have been rehabilitated. 3 FCC Rcd at 4889 ¶ 114. He told the Commission that Melton would acquire a 49 percent interest in Tri-State and would become an officer and director of Tri-State. He also became the stations' general manager. *Id.* at 4891 ¶ 123.

5. In 1985, the Commission designated the stations' renewal applications for a comparative renewal hearing with the mutually exclusive applications of Grimm & Clifford. At issue is the question of whether Tri-State made misrepresentations or lacked candor in its representations to the Commission about the participation of Melton in the operation of the stations and the ownership of Tri-State after Tri-State informed the Commission that Melton would not be involved in ownership or management.[2]

6. We find that the record fully supports the Board's conclusions that Tri-State made misrepresentations and lacked candor concerning Melton's status at the stations during 1974-78. We agree that Tri-State deceived the Commission when it acquired the stations, in view of Tri-States' assurances that Melton would be excluded from the ownership and management of the stations and would instead serve as a salesman. These representations, relied on by the Commission, left the impression not only that Melton would be divested of the formal attributes of ownership and management but that he would not be in a position or have an interest that would enable him to exercise influence over the stations.[3] *Cf. Benjamin L. Dubb*, 16 FCC 274, 289 ¶ 3 (1951) (the Commission is concerned with the "power to dominate the management of corporate affairs," not merely the corporation's ownership of record). As the Board found, the actual state of affairs during the 1974-78 time period was that Melton continued to hold a position and an interest in the stations that made Tri-State's representations misleading. *See*

5 FCC Rcd at 1169-73 ¶¶ 93-114. Such misconduct warrants denial of the stations acquired under these circumstances.[4]

7. Contrary to Tri-State's representations, Melton did not serve as a salesman during the relevant period. Credible witnesses testified that Melton did not engage in the activities normally associated with being a salesman. 3 FCC Rcd at 4892 ¶¶ 134-36, 4893 ¶¶ 139, 143, 4894-95 ¶¶ 150-52. The record establishes that Melton handled few if any cash accounts and that his handling of station trade accounts was mainly for his own benefit, not the stations'. *Id.* at 4882-83 ¶¶ 54-67, 4884-85 ¶¶ 72-85. Instead, Melton continued to have an active and influential role in station management that made Tri-State's assurances that Melton had withdrawn from management misleading. Melton, for example, participated in extensive discussions with top station management, who by their own admissions took these discussions into account in making management decisions. *Id.* at 4887 ¶¶ 98-99. As several witnesses testified, it was generally understood around the stations that Melton was an owner/manager. *Id.* at 4893 ¶¶ 137, 139, 141, 4894-95 ¶¶ 151, 155, 157, 4897 ¶ 173. Similarly, Melton's extraordinary, unsupervised use of station trades for his own benefit indicates that he was not a mere employee. The record thus indicates that Melton not only participated in management decisions but that he was accorded a status in the stations indicative of influence. Indeed, Melton's occupation was reflected in his 1975-77 federal income tax returns as "Vice-President-General Manager." 5 FCC Rcd at 1160 ¶ 23. (Tri-State's attempt to characterize this designation as the result of ministerial error lacks credible support.)

8. The record also discredits the claim that Leverant functioned as the true general manager of the stations (in place of Melton). The discrepancy in Leverant's status is illustrated, for example, by the fact that in the middle of his tenure as general manager, he was permitted to return to his full-time job as a lawyer with the Phoenix City Attorney's office. 3 FCC Rcd at 4888 ¶¶ 103-04. During this period, Leverant received a salary lower than any other station employee. Leverant was also permitted to pursue a private law practice during his tenure as general manager. *Id.* at 4888 ¶¶ 104, 107.

9. Additionally, the record indicates that Melton's 1978 "reinstatement" and supposed purchase of a 49 percent stock interest was also misleading. An examination of this transaction indicates that its depiction as a market value sale of a 49 percent interest to Melton conceals the questions it would otherwise raise about the purported withdrawal of Melton from ownership and management. The evidence shows that the transaction was not, as Tri-State originally represented, a straightforward sale at "book value" or at any rationally chosen sales price. *See* 3 FCC Rcd at 4889 ¶ 114. The price chosen, $114,556, was arbitrary and had no relation to the station's market value. *Id.* at 4890 ¶¶ 118-19. (Two years later the stations were listed with a broker for $6-7.5 million. *Id.*) The record indicates that Melton's salary was increased to cover his payments for the 49 percent interest and, in any event, Melton did not make all of the specified payments. *Id.* at 4890-91 ¶ 122.

10. We also wish to make three further observations. First, like the Board, we find that the record evidence fully supports the conclusion that Tri-State committed disqualifying misconduct. *See* 5 FCC Rcd at 1170-71 ¶¶ 101-02, 1172-73 ¶ 113.[5] Thus, the outcome of this case would not change even if, as Tri-State contends, the Commission should have placed the burden of going forward and the ultimate burden of proof on Grimm & Clifford for this issue. *Id.* at 1172 ¶¶ 109-11. Second, we agree with the Board that the evidence indicates that Tri-State lacked candor during the course of this proceeding. *Id.* at 1171 ¶¶ 106-07. Nonetheless, in our view, such a finding is not essential in concluding that Tri-State should be disqualified given Tri-State's flagrant misconduct during the 1974-78 time period. We therefore need not reach Tri-State's due process arguments with respect to this issue. Third, we reject Tri-State's contention that it was prejudiced by the ALJ's refusal to permit it to present rebuttal evidence. We have examined the evidence that Tri-State proffered (*Request to Reopen the Record and to Schedule Rebuttal Phase of the Hearing* filed November 7, 1986 by Tri-State) and find that it relates to collateral questions that would not affect the outcome of this proceeding. *See Armond J. Rolle*, 31 FCC 2d 533, 537 ¶ 8 (Rev. Bd. 1971).

11. ACCORDINGLY, IT IS ORDERED, That the Petition to Deny and to Intervene filed September 4, 1990 by the NAACP IS DISMISSED;[6] and the Consent Motion to Extend and Establish Procedural Dates [to respond to the NAACP's petition] filed October 2, 1990 by Tri-State Broadcasting Company, Inc. IS DISMISSED as moot.

12. IT IS FURTHER ORDERED, That since oral argument would not aid the Commission's deliberations, the Request for Oral Argument filed July 18, 1990 by Tri-State Broadcasting Company, Inc. IS DENIED.

13. IT IS FURTHER ORDERED, That the Application for Review filed July 19, 1990 by Tri-State Broadcasting Company, Inc. IS DENIED; Tri-State's applications for renewal of stations KUKQ(AM) and KUPD-FM (File Nos. BR-830609UH, BRH-830609WZ) ARE DENIED; and Grimm & Clifford's mutually exclusive applications for construction permits (File Nos. BP-830831AB, BPH-830831AI) ARE GRANTED.

14. IT IS FURTHER ORDERED, That Tri-State Broadcasting Company, Inc. IS AUTHORIZED to continue operation of stations KUKQ(AM) and KUPD-FM until 12:01 a.m. on the ninety-first (91st) day following the release of this order to enable the licensee to conclude the station's affairs; PROVIDED, HOWEVER, That if the licensee seeks reconsideration or judicial review of our order, it IS AUTHORIZED to continue to operate the station until 12:01 a.m. on the ninety-first (91st) day following the release of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate; provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and the licensee seeks Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of renewal, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Now pending before the Commission are: (1) an Application for Review filed July 18, 1990 by Tri-State Broadcasting Company, Inc., and oppositions filed August 2, 1990 by Grimm & Clifford and the Mass Media Bureau; (2) a Request for Oral Argument filed July 18, 1990 by Tri-State, and an opposition filed August 2, 1990 by Grimm & Clifford; (3) A Petition to Deny and to Intervene filed August 2, 1990 by the NAACP, and oppositions filed September 12, 1990 by the Bureau and September 19, 1990 by Tri-State; and (4) a Consent Motion to Extend and Establish Procedural Dates filed October 2, 1990 by Tri-State.

[2] In view of the Board's disqualification of Tri-State for misrepresentation and lack of candor, two other qualifying issues designated against Tri-State became moot. These are: whether Norris' involvement in state criminal law violations disqualified Tri-State, and (2) whether Tri-State violated the Commission's rules regarding public inspection files.

[3] For example, Tri-State sent the Commission a copy of a letter to Melton purportedly demoting him. The letter states: "As a salesman you are to restrict yourself to the duties normally consistent with that position and you are to take no part in any administrative or managerial decisions." Tri-State Exh. 9, Att. 1-G at 183. The amendment to the assignment application reporting Melton's deletion as a stockholder characterizes that action as: "Mr. Melton's withdrawal from the proposed ownership and management of Tri-State . . ." Tri-State Exh. 9, Att. 1-F at 171.

[4] We note that the circumstances of this case differ in important respects from those in *KQED, Inc.*, 6 FCC Rcd 625, 626 ¶ 10 (1991), *appeal pending*. In *KQED*, we found that misrepresentations and lack of candor were directly related to the operation of only one of three co-owned and co-located stations and that, therefore, denial of the license of that single station would act as an effective deterrent. We were thus able to find that the misconduct involving one station was not predictive of further misconduct at the others. By contrast, in this case, we find it significant that the misrepresentations and lack of candor related equally to each of the stations involved. Accordingly, and because there are no mitigating circumstances, we find that Tri-State lacks the qualifications to retain either station and that only depriving Tri-State of all of the fruits of its misconduct will serve as an effective deterrent. Because the misconduct directly related to both stations, this case does not raise a question of whether misconduct at one station is predictive of misconduct at an *uninvolved* station.

[5] We note that, as a matter of administrative law, the standard of proof applicable in Commission renewal hearings is the preponderance of evidence and not clear and convincing evidence. *Mid-Ohio Communications, Inc.*, 5 FCC Rcd 4596, 4597 n.3 (1990), and cases cited therein.

[6] In view of the disqualification of Tri-State, the allegations in this petition, that KUKQ(AM) and KUPD-FM have deficient EEO records, are moot. Additionally, the petition is procedurally defective in that it combines requests to the Commission and the Chief, Mass Media Bureau in the same pleading, in violation of 47 C.F.R. § 1.44.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-119

In the Matter of

Florida Region Public
Safety Plan

ORDER

Adopted: May 7, 1991; Released: May 16, 1991

By the Chief, Land Mobile and Microwave Division and the Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Florida (Region 9) Public Safety Plan (Plan) on May 10, 1990, 5 FCC Rcd 3067 (1990).

2. By letter dated February 13, 1991, the Region proposed to amend its Plan. The proposed amendment would establish licensing benchmarks. The Commission placed the letter on Public Notice for comments, 56 FR 10428 (3-12-91), and received no comments.

3. We have reviewed the proposed amendment to the Region 9 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Florida (Region 9) IS AMENDED, as set forth in the Region's letter of February 13, 1991. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile & Microwave Division

Will McGibbon
Chief, Spectrum Engineering Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Allnet Communication Services, Inc. Complainant,	
v.	
National Exchange Carrier Association	File No. E-89-196
Illinois Bell Telephone Company	File No. E-89-197
Michigan Bell Telephone Company	File No. E-89-198
Ohio Bell Telephone Company	File No. E-89-199
Wisconsin Bell Telephone Company	File No. E-89-200
Southern Bell Telephone and Telegraph Company	File No. E-89-201
South Central Bell Telephone Company	File No. E-89-202
Pacific Bell Telephone Company	File No. E-89-203
Nevada Bell Telephone Company	File No. E-89-204
The Southern New England Telephone Company	File No. E-89-205
Southwestern Bell Telephone Company	File No. E-89-206
Cincinnati Bell Telephone Company	File No. E-89-212
Contel Service Corporation-California	File No. E-89-213
Contel Service Corporation-New York	File No. E-89-214
Contel Service Corporation-Texas	File No. E-89-215
Contel Service Corporation-Virginia	File No. E-89-216
GTE North-Illinois	File No. E-89-217
GTE North-Indiana	File No. E-89-218
GTE North-Michigan	File No. E-89-219
GTE North-Ohio	File No. E-89-220
GTE North-Pennsylvania	File No. E-89-221
GTE North-Wisconsin	File No. E-89-222
GTE North-Iowa	File No. E-89-223
GTE North-Missouri	File No. E-89-224
GTE of the South	File No. E-89-225
GTE of the Southwest	File No. E-89-226
GTE of California	File No. E-89-227
Hawaiian Telephone Company	File No. E-89-228
GTE-Florida	File No. E-89-229
New England Telephone and Telegraph Company	File No. E-89-230
New York Telephone Company	File No. E-89-231
Defendants.	

MEMORANDUM OPINION AND ORDER

Adopted March 28, 1991; Released May 16, 1991

By the Commission:

I. INTRODUCTION

1. Allnet Communicatios Services, Inc. (Allnet) filed formal complaints pursuant to Section 208 of the Communications Act (Act), 47 U.S.C. § 208, against the above-referenced defendants on May 26, 1989. The complaints allege that, because of defendants' overstatement of inside wire costs and excessive deferred taxes, the carrier common line (CCL), traffic sensitive, and special access rates charged by defendants, which took effect on January 1, 1988, were unjust and unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). Allnet seeks an Order requiring the defendants to pay damages in the form of refunds of all amounts due Allnet as a result of the unlawful rates. For the reasons set forth below, we grant Allnet's complaints in part and deny them in part.

II. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. Allnet's complaints are based largely on two Commission orders in CC Docket No. 88-1[1] in which the Commission investigated a number of issues relating to the local exchange carriers' (LECs') Annual 1988 Access Tariff Filings. On December 27, 1988, the Commission issued its *December 27 Order* which, *inter alia*, disallowed projected revenue requirements associated with inside wire installation and maintenance and excess deferred taxes. These deferred tax disallowances directly affected CCL, traffic sensitive, and special access charges. In its *April 27 Recon Order*, the Commission reexamined each disallowance questioned on reconsideration, including the two relied on by Allnet in these complaints.

3. Allnet contends that NECA's 1988 CCL rates, incorporated by reference by the LECs in their access tariffs, recovered inside wire costs which the Commission had partially disallowed, and, therefore, are unjust and unreasonable under Section 201(b) of the Act to the extent that the rates reflect the disallowed amounts.[2] Allnet argues that the Commission in the *April 27 Recon Order* specifically stated that disallowance findings in the *December 27 Order* would be " *prima facie* evidence [of unlawfulness] in a Section 208 complaint proceeding." *See* Allnet's Opposition to Motion to Dismiss at 9-10, *citing April 27 Recon Order* at para. 12. According to Allnet, the disallowances listed in Attachment B to the *December 27 Order* represent the amount of inside wire disallowances customers, including Allnet, are entitled to recover through complaints against the National Exchange Carrier Association (NECA) and the LECs. Allnet further contends that the common line, traffic sensitive, and special access rates of the defendant LECs were also unjust and unreasonable under Section 201(b) during the period in question because they recovered costs associated with deferred tax expenses which the Commission found to be excessive. Allnet states that Appendix C of the *April 27 Recon Order* sets forth amounts representing the excess deferred taxes reflected in the LECs' CCL, traffic sensitive and special access rates that the Commission determined may be recovered from the LECs by interstate access customers pursuant to Section 208 complaints. Allnet requests refunds of all amounts allegedly due it as a result of defendants' rates which it contends were excessive to the extent that they recovered costs disallowed by the Commission in its *April 27 Recon Order*. In addition, Allnet requests that it "be awarded any and all costs associated with the preparation and filing" of its complaint.

4. Defendants dispute Allnet's contentions on a number of substantive and procedural grounds. [3] Although the arguments advanced by the various defendants are not identical, the thrust of their arguments is similar. Defendants argue, *inter alia*, that Allnet has failed to allege facts sufficient to sustain a cause of action under the Act.[4] According to defendants, Allnet's claims of unjust and unreasonable rates are based solely on disallowances of forecasted revenue requirements. They argue that an evaluation of the reasonableness of rates under Section 201(b) of the Act must take into account the actual, not forecasted, results and contend that Allnet has not demonstrated that the actual rates charged by these defendants resulted in violations of Section 201(b). Southern New England Telephone Company (SNET), for example, argues that a "revenue requirement disallowance may or may not result in unreasonable rates, depending on a number of factors." Answer and Motion to Dismiss of SNET at 5. One such factor, according to SNET and several other defendants, is the actual return realized by the carrier. To this end, the Ameritech Companies have submitted evidence showing that their actual earnings overall company-wide basis for the period in question were 11.92%, well within the level authorized by the Commission.[5] Other defendants argue that their actual expenses exceeded the forecast by more than the disallowed amounts.[6] These defendants conclude that since they have refuted Allnet's claim that their rates were excessive, the complaints should be dismissed. As to the inside wire expenses issue, the defendants contend that Allnet relies on an erroneous interpretation of the *April 27 Recon Order*. According to defendants, the disallowances set forth in the *December 27 Order* and relied on by Allnet were specifically reversed in the *April 27 Recon Order*.

5. Other issues argued in unison by defendants include claims that Allnet fails to specify the amount of damages and improperly requests that it be reimbursed for all costs associated with preparing and filing the complaints.[7]

6. In opposition to the motions to dismiss, Allnet asserts that arguments relating to whether the Commission reaffirmed its *December 27 Order* with respect to inside wire expense are not a valid basis for a motion to dismiss since they are not procedural but go to the merits of the complaint. Allnet claims that in any event, defendants are wrong in asserting that the inside wire disallowances were not reaffirmed. It argues that "[a]lthough the Commission did not fully reaffirm the *lower level* of disallowances *for inside wiring* found in [the *December 27 Order*], the Commission did state its belief that *higher* levels of disallowances for inside wiring were appropriate." Opposition at 6 (emphasis in original). Allnet, therefore, concludes that the Commission declined to order refunds because the disallowances were not high enough and it did not want to prejudice claims of customers for larger awards. Allnet maintains, however, that the *April 27 Recon Order* firmly established floors for disallowances due customers.

7. As for defendants' claim that Allnet provided no support for its allegations that specific rates were unjust and unreasonable, Allnet contends that the "Commission has already ruled on this issue and found that the disallowances of its *December 27 Order* and *April 27 Recon Order* make a *prima facie* case for refunding the amounts identified." Opposition at 9. Thus, Allnet contends, the Commission has already concluded that the rates were unjust and unreasonable by at least the disallowed amounts. Allnet also rejects defendants' arguments that its complaints should be dismissed for failure to allege damages with specificity. Allnet points out that the Communications Act provides that a complaint cannot be dismissed for failure to state specific damages in the complaint. Opposition at 17, *citing* 47 U.S.C. § 208(a).

8. In reply to defendants' substantive claims, Allnet maintains that the Commission in its *April 27 Recon Order* found the CCL rates charged by NECA and the LECs to be unjust and unreasonable and subject to damage claims under Section 208 of the Act. Allnet adds that the Commission also reaffirmed that disallowances totalling $21.7 million for excess deferred taxes were eligible for recovery by complainants in Section 208 proceedings. It further asserts that the LECs who maintain that the Commission did not reaffirm the inside wire disallowances have misinterpreted the *April 27 Recon Order*. According to Allnet, "the correct, and only logical interpretation" of the Commission's *April 27 Recon Order* is that the inside wire disallowances set forth in the *December 27 Order* were not affirmed only to the extent that the Commission had relied on comparisons of actual to projected expenses."[8] In addition, Allnet quotes Commission language which it claims strongly suggests that the disallowances should have been greater. Allnet thus concludes that the amounts identified in the *December 27 Order* were the "minimum" that should be disallowed. Allnet also quotes language from of the Commission's *April 27 Recon Order* to support its contention that the Commission has already determined that the rates were

unjust and unreasonable and that Allnet is not required to "redemonstrate" this in the instant complaints. Reply at 21.

9. Finally, Allnet disputes defendants' allegation that it is not entitled to recover costs associated with preparing its complaint. It quotes Section 209 of the Act, 47 U.S.C. § 209,[9] to support its contention that the Communications Act does not prohibit the Commission from awarding "damages which may include the costs of preparation of the complaint". Reply at 24.

III. DISCUSSION

A. Inside Wire Expenses

10. We have carefully reviewed the pleadings before us and find no merit in Allnet's claim that defendants' CCL rates were unlawful as a result of inside wire expenses disallowed in our *December 27 Order*. We specifically stated in our *April 27 Recon Order* that we did not reaffirm that portion of the *December 27 Order*. 4 FCC Rcd at 3968. It is true as Allnet states that we indicated that the potential disallowances could be larger than those set forth in the *December 27 Order* and that "[r]eaffirming a disallowance that *is likely* to be too small could unfairly prejudice customers in any future Section 208 proceedings." Contrary to Allnet's contentions, however, these statements cannot be said to be a binding determination that the inside wire disallowances from the *December 27 Order* were either too large or too small. *Id.* The net effect of our *April 27 Recon Order* was the rejection of the method used to calculate the disallowances based on our determination that the comparison of forecast and actual data was not likely to produce an appropriate disallowance. *Id.* at 3968. Allnet is simply not justified in concluding that the amounts listed in the *December 27 Order* formed floors for disallowances.

11. Nor is there merit in Allnet's contention that the Commission in the *April 27 Recon Order* reaffirmed the inside wire disallowances except to the extent that the Commission had relied on comparisons of actual to projected expenses. We specifically stated in the *December 27 Order* that the entire inside wire disallowance was based on comparisons of forecast and actual quantities. *December 27 Order* at 3966, 4119-20. Therefore, the *April 27 Recon Order* effectively rejects the entire inside wire expense disallowance. Because no part of the inside wire expense disallowance was reaffirmed, our *December 27 Order* cannot serve as *prima facie* evidence of unlawfulness in a Section 208 complaint proceeding. Allnet has proffered no other evidence to support its allegations of unjust and unreasonable CCL rates. Since Allnet has not sustained its burden of proof in this regard, the above-listed complaints are dismissed to the extent that they allege that defendants' CCL rates were unlawful with respect to inside wire disallowances.

B. Deferred Tax Expenses

12. The *April 27 Recon Order* reaffirmed certain disallowances for excess deferred taxes to the extent set forth in in Appendix B of that order. Those disallowances are not at issue here. The *April 27 Recon Order* further provided, however, that additional disallowances, shown in Appendix C of the order, "may be sought in Section 208 proceedings . . . ." *Id.* at 3971. Thus, the information shown in Appendix C of the *April 27 Recon Order* and cited by Allnet in its complaint, constitutes *prima facie* evidence of excess projected deferred tax in the amounts listed therein. It is therefore incumbent upon the defendant carriers to refute or rebut this evidence in whole or in part by showing that the rates during the period in question were not unjust or unreasonable notwithstanding the excess deferred taxes.[10] We do not agree with Allnet's primary argument that, the Commission in the *April 27 Recon Order* already considered and rejected the adjustments and other justifications offered by defendants that, if accepted, would reduce or eliminate the disallowances. Nor do we agree with Allnet's claim that the LECs' rates in question are *prima facie* unlawful because removal of the disallowed amounts from the projected revenue requirements would have resulted in excess earnings. To the contrary, our *April 27 Recon Order* clearly provided that, with respect to the deferred tax issue, a carrier could avoid refunds by showing that actual revenue requirements were understated by a sufficient amount to offset or compensate for the disallowances stated in Appendix C. *Id.* at 3970-71.

13. The disallowances set forth in Appendix C of the *April 27 Recon Order* are reflected in the rates charged for three access charge categories or classifications: CCL, traffic sensitive, and special access. The *April 27 Recon Order* provides that any refunds owing from the latter two classifications are to be obtained directly from the respective carriers. *Id.* at 3966. With respect to the CCL category, we stated that " . . . NECA was not named as party to [CC Docket No. 88-1] and accordingly cannot be ordered to refund these amounts at this time." *Id.* The *April 27 Recon Order* further provides, however, that NECA's access customers could "file Section 208 complaints against NECA to recover reparations for excessive rates." *Id.* In the instant case, however, Allnet's claims against NECA go solely to the question of excess CCL earnings resulting from defendants' alleged overstatement of inside wire expenses. The deferred tax issue is raised by Allnet only in its complaints against individual LECs. NECA, for its part, although arguing for dismissal of the Allnet complaint on procedural grounds, nevertheless responded to Allnet's claims regarding alleged overstatement of inside wire expenses by showing actual financial results for 1988. While directed primarily at the inside wire expense issue, the information submitted by NECA is broad enough to encompass alleged excess deferred taxes for the CCL rate element. Therefore, without a determination of whether a complaint may properly lie against NECA despite our dicta in the *April 27 Recon Order*,[11] we have taken the opportunity on our own to consider NECA's submission, given its unique role at that time *vis a vis* the CCL rate element as the tariff and financial administrator of the CCL revenue pool on behalf of all LECs. The information submitted by NECA, which has not been disputed by the complainant, shows that actual revenue requirements for 1988 exceeded the projected amount by $28 million. Since this more than offsets[12] the total amount of potential CCL refund liability in the amount of $16.2 million shown in Appendix C of the *April 27 Recon Order*, we find that despite any overstatement of deferred taxes, the record demonstrates that the carrier rates filed by NECA on behalf of the defendants and other LECs were not unreasonable during the period in question. Thus, we conclude that information submitted by NECA successfully rebuts the evidentiary basis of Allnet's complaint insofar as it seeks to recover deferred tax disallowances through CCL rate refunds from the defendants.

14. With respect to traffic sensitive and special access rates *vis a vis* the deferred tax disallowances, we find that defendant New England Telephone and Telegraph Company has also successfully rebutted claims that its traffic-sensitive rates were unlawful as a result of overstated deferred taxes by showing that, for the traffic sensitive rate category taken as a whole, such overstatements were more than offset by understatements in other traffic sensitive expense categories.[13] Since Allnet provided no additional evidence to refute the defense raised by this defendant, we find that New England Telephone and Telegraph Company has made a persuasive showing that their rates at issue were not unreasonable despite the excess deferred taxes.

15. The remaining defendants, Ameritech, on behalf of Wisconsin Bell; Contel of California, New York, Texas and Virginia (collectively "Contel");[14] GTE of the Southwest ("GTE"), and Hawaiian Telephone Company ("Hawaiian Tel"), on the other hand, have proferred no reliable evidence to refute Allnet's contentions that their traffic sensitive and special access rates were unjust and unreasonable during the period in question insofar as they recovered disallowed excess deferred taxes.[15] These carriers, therefore are liable for damages stemming from traffic sensitive and special access disallowances in the amounts originally shown in Appendix C of the *April 27 Recon Order*. In an Appendix attached to this Order, the actual amounts of disallowances for both the traffic sensitive and special access rate classifications are shown for each affected carrier. The amounts shown in the Appendix are carried forward from Appendix C of the *April 27 Recon Order*.

IV. CONCLUSION

16. In view of the foregoing, we find that a number of the defendants, as named in the attached Appendix, are liable for damages in the form of refunds for having charged excessively high rates. The proper measure of damages would, in effect, be calculated by determining the difference between the actual rate charged and the rate which would have prevailed had it been targeted to recover a revenue requirement reduced by the amount of disallowance of excess deferred taxes. In view of the need for fairly extensive billing and financial records to make such calculations, we direct the parties to work cooperatively and engage in such good faith negotiations as necessary to achieve a settlement on the issue of damages consistent with our ruling herein. The affected parties are further directed to report back to the Common Carrier Bureau's Enforcement Division within thirty days of the release of this Order as to whether an agreement has been reached or to report on what progress has been made and the need for any Bureau assistance. Notwithstanding the above, if no agreement is reached within ninety days of the release of this Order, a further proceeding will be established directed at resolving the issue of damages.

V. ORDERING CLAUSES

17. Therefore, IT IS ORDERED that the motions to dismiss the above-listed complaints ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

18. IT IS FURTHER ORDERED that the above-listed complaints ARE GRANTED to the extent noted, and otherwise DISMISSED WITHOUT PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Disallowances for Excess Deferred Taxes which have been Upheld:

($000)

NAME	TRAFFIC SENSITIVE DISALLOWANCE	SPECIAL ACCESS DISALLOWANCE
Contel-California	67	0
Contel-New York	0	14
Contel-Texas	47	0
Contel-Virginia	73	0
GTE of the Southwest	927	0
Hawaiian Telephone	846	152
Wisconsin Bell	675	0
Total	$2,635	$166

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, 4 FCC Rcd 4115 (1988) (*December 27 Order*), *recon.*, 4 FCC Rcd 3965 (1989) (*April 27 Recon Order*), *further recon.*, 4 FCC Rcd 7906 (1989), *appeal pending sub nom.* Southern Bell Telephone & Telegraph Co. v. FCC, No. 89-1081 (D.C. Cir filed Feb. 2, 1989).

[2] Section 201(b) provides in pertinent part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful . . . .

[3] All of the defendants except Cincinnati Bell Telephone Company, Contel Service Corporation-California, Contel Service Corporation-New York, Contel Service Corporation-Texas, and Contel Service Corporation-Virginia either filed a motion to dismiss or included a motion to dismiss as part of the answer. We grant these motions to the extent that we are dismissing the complaints without prejudice. Otherwise, the motions are denied.

[4] NECA also argues that Section 208 complaints may be brought only against common carriers, and that it is not a common carrier, but "appears solely as the agent of its member local exchange carriers (LECs) through its role as the administrator of the Common Line (CL) revenue pool . . . ." Answer at 2. Because of our action here, however, we need not reach the question of NECA's proper status in complaint proceedings. *See* para. 13, *infra*.

[5] *See* Answer of Ameritech Companies at 4-5, Motion to Dismiss at 5-6.

[6] *See, e.g.*, Consolidated Answer and Motion to Dismiss of New England Telephone and Telegraph Company and New York Telephone Company; and Answer of NECA, with attached affidavit of Thomas E. Quaintance.

[7] Ameritech also contends that the access rates complained of by Allnet were prescribed by the Commission in the CC Docket 88-1 proceedings, *see* n.1, *supra*, and therefore, are not subject to damage claims under Section 208 of the Act. Ameritech's claims in this regard are without merit. The Commission previously rejected claims that CC Docket No. 88-1 was a prescription proceeding. *See April Recon Order*, 4 FCC Rcd at 3967.

[8] *See* Allnet Reply to Answers and Motions to Dismiss.

[9] Section 209 states:

> If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

[10] As noted, *supra*, defendants argue that Allnet's complaints fail to state a cause of action and, therefore, must be dismissed. Since Appendix C data constitute *prima facie* evidence that deferred tax amounts were overstated, the burden falls upon defendants to show that such overstatements did not result in unreasonable rates. Allnet is not obliged, therefore, to go beyond the introduction of Appendix C data to establish a cause of action.

[11] *See*, n.4, *supra*.

[12] The *April 27 Recon Order* specifically provided that a finding that one component of a revenue requirement has been overstated does not preclude a carrier from showing in a Section 208 proceeding that as a result of offsets, the resultant rates were not unjust or unreasonable. *Id.* at 3967.

[13] New England Telephone and Telegraph Company and New York Telephone Company Answer and Motion to Dismiss at 8-9.

[14] We note Contel's threshold arguments that: (1) the complaints were not properly served because Contel Service Corporation, the name listed for the defendant by Allnet, is not a proper party to the proceeding, (2) the $100,000 cutoff for disallowances stemming from the *December 27 Order*, would, in any event, nullify complainant's claim for refunds, and (3) Allnet is not a customer of Contel. Although we agree that the correct carrier name should appear on all complaints, the error here is *de minimis*. We recognize, further, that a possible source of Allnet's confusion may have been the nomenclature used in Contel's tariffs and transmittal letters; i.e., Contel Telephone Companies and Contel Service Corporation, respectively. We also believe that the intent of the *December 27 Order*, which did not require refunds where the total disallowance for a given expense category such as deferred taxes was less than $100,000 per study area, was to require the inclusion of CCL disallowances in calculating the total disallowance for excess deferred taxes. Thus, each of the named Contel companies would exceed the $100,000 cutoff. With regard to the claim that Allnet is not a customer of Contel with respect to the services at issue in the complaint, Allnet refutes this affirmative defense by claiming that it is a customer, at least for terminating switched access which requires the payment of CCL charges in Contel's territory. We cannot resolve this question on the record before us nor do we believe we need to given our ruling herein. Contel's potential liability stemming from the disallowances is set forth in the Appendix attached to this order. Allnet's prorated share of such amounts, if any, will be determined as a result of negotiations we are directing the parties to undertake consistent with our findings. If such negotiations prove unsuccessful, then the issue of damages will be addressed in further proceeding before the Commission.

[15] Ameritech's showing that its company-wide interstate access rate of return for the period covered by Allnet's complaint was only 11.92%, based on actual data, is not relevant to the question whether Ameritech's rates for particular service categories were unjust or unreasonable. Ameritech has not shown that it failed to earn its authorized rate of return on any of the service categories at issue here. *See* MCI Telecommunications Corp. v. Pacific Northwest Bell Tel. Co., *et al.*, 5 FCC Rcd 216, 222-223 (1990), *recon. denied* 5 FCC Rcd 3463 (1990), *appeal pending sub nom.* Mountain States Tel. & Tel. Co., *et al.*, v. FCC, Case Nos. 90-9510 *et al.*, (10th Cir. filed March 6, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-43

In re Applications of

SUNSHINE BROADCASTING, INC. File No. BPH-870625MI

HARTSVILLE BROADCASTING CO., INC. File No. BPH-870629NC

For Construction Permit for a New FM Station on Channel 253A in Hartsville, South Carolina

Appearances

Jerrold Miller, on behalf of Sunshine Broadcasting, Inc.; *Matthew H. McCormick* and *Cheryl A. Kenny*, on behalf of Hartsville Broadcasting Co., Inc.; and *Larry Miller*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: May 8, 1991; Released: May 16, 1991

Preliminary Statement

1. This case involves two mutually exclusive applicants, Sunshine Broadcasting, Inc. (Sunshine) and Hartsville Broadcasting Co., Inc. (HBC), for a new FM broadcast station to operate on Channel 253A at Hartsville, South Carolina. The Sunshine and HBC applications were designated for hearing by *Hearing Designation Order*, 55 Fed. Reg. 6314 (February 22, 1990) (hereinafter HDO) on the following issues:

> 1. If a final environmental impact statement is issued with respect to [HBC] in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§1.1301-1219.
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The *HDO* also directed that the applicants' coverage proposals be considered under the standard comparative issue. *HDO*, ¶ 8. The parties stipulated that neither seeks a comparative coverage preference. Joint Stipulation No. 1.

2. By *Order*, FCC 90M-975 (released April 27, 1990), the Presiding Judge resolved, by summary decision, the contingent environmental issue in favor of HBC.

3. By *Memorandum Opinion and Order*, FCC 90M-2254 (released July 26, 1990), the following issues were added against Sunshine.

> 1. To determine whether Sunshine Broadcasting, Inc. is financially qualified to be a Commission licensee.
>
> 2. To determine whether Sunshine Broadcasting, Inc. has misrepresented facts or lacked candor in certifying it is financially qualified.
>
> 3. To determine whether Sunshine Broadcasting, Inc.'s specification, in its application, of its currently proposed transmitter site constitutes a misrepresentation and/or lack of candor.
>
> 4. To determine whether, in light of the evidence adduced under the foregoing issues, Sunshine Broadcasting, Inc. is basically qualified to be a Commission licensee.

The burdens of proof and proceeding were placed on Sunshine. In adding the financial certification issue, the Presiding Judge held "HBC will be permitted under the financial certification issue to inquire into whether Sunshine made false representations concerning its financial qualifications at deposition or in the declarations attached to Sunshine's Opposition." *Id.*, p. 2 n. 1.

4. Prehearing conferences were held on April 27, 1990 and August 31, 1990. *See Order*, FCC 90M-365 (released February 23, 1990); *Order*, FCC 90M-2768 (released September 4, 1990). Hearing sessions were held September 5-7, 1990. The record was closed at the conclusion of the September 7 session. Proposed findings of fact and conclusions of law were filed November 16, 1990; replies were filed November 30, 1990.

Findings of Fact

Comparative Issue

SUNSHINE BROADCASTING, INC.

5. Sunshine is a corporation with the following officers, directors and stockholders:

Name	Ownership Percentage	Office Held	Director
Michael G. Orr	41.7%	President/ Treasurer	Yes
Theodore J. Gray, Jr.	41.7%	Vice President/ Secretary	Yes
Tressie P.	16.6%	--	Yes

Sunshine Ex. 1, p. 1

Integration

6. In its Integration Statement, Sunshine claimed integration credit in the following percentages: Orr, 41.7%; Gray, 16.7%; Hughey, 6.6%. *Id.* Sunshine, through counsel, conceded at hearing that it was bound to the ownership figures in its Integration Statement for integration credit. Tr. 267-68. Sunshine seeks integration credit only for Orr and Gray. Sunshine's proposed integration of Hughes was withdrawn prior to the hearing. *See* Sunshine's "Supplement to Integration Statement" filed August 29, 1990.

7. *Michael Orr* proposes to serve as full-time General Manager of the Hartsville station. As such, he will have overall supervisory responsibility for all aspects of the station's operations, including the shaping of the station's entertainment, news and public affairs programming; and overall responsibility for sales efforts, the budget, developing station policies and hiring, firing and supervising personnel. All other employees will report to him "either directly or ultimately." Sunshine Exhibit 2, p. 2.

8. Orr has no business or civic commitments which would preclude him from devoting at least 40 hours per week to this role as General Manager of the proposed station. He will resign any employment he may have before the Hartsville station begins broadcasting, so as to be completely free to devote full time to the station. Sunshine Exhibit 2. Since 1988, Orr has been in the home building business. He will close down his home building business if Sunshine's FM application is granted.

9. Orr currently resides in Cheraw, South Carolina, where he has lived for 20 years, but proposes to move to Hartsville if Sunshine's application is granted. Sunshine Exhibit 2, p. 2.

10. Orr's broadcast experience began in 1970 when he worked as an announcer at WBGC, Chipley, Florida. From 1970 to 1972, he was an announcer and salesman at WCRE, Cherew. From 1972 to 1977, he was Station Manager of WCRE, and from 1977 to 1987, he was President and owner of that station. Sunshine Exhibit 2.

11. *Theodore J. Gray, Jr.*, will serve as the Sales Manager of Sunshine's FM station. He will work fulltime on a daily basis, a minimum of 40 hours per week. As Sales Manager, Gray will supervise and set policy for the Sales Department at the station, directly supervising all stations staff in that area. He will report to the General Manager, who will have the final say on all matters involving day-to-day operation of the station. Sunshine Exhibit 3.

12. Gray is the 100% owner of Alamance Broadcasting, Inc., licensee of WSML(AM), Graham, North Carolina and is the station's full-time General Manager. Sunshine Exhibit 1, p. 1; Tr. 232. Gray intends to retain his ownership of WSML. However, his 26 or 27 year old son, Joey, who has been with the station since 1985 and is now the station's sales manager, will take over operation of the station when Gray leaves to work at the Hartsville station. Tr. 232-33. Gray does not draw a salary from Alamance but receives profits from the station. Tr. 233-34.

13. Gray also is engaged in a broadcasting brokerage business under the name of Gray, Tice & Associates. Tr. 234. He has an oral partnership with Olin Tice under which the two split commission on a 50/50 basis. *Id.* Gray intends to continue working with Tice on brokerage matters even if Sunshine's Hartsville application is granted. Tr. 236. The time that Gray devotes to brokerage matters varies. Gray estimates that he has spent 10 to 15 hours a week including telephone time on such matters since the Hartsville application was filed. Gray estimated the high end of the range of hours in any week at 20 hours. Tr. 237. Gray's brokering will not preclude him from spending 40 hours or more at the proposed radio station. Gray does most of his brokering on the weekends and on the telephone at night. He does very little traveling on brokerage matters and, if travel is necessary, he usually travels on weekends. Tr. 293.

14. Gray currently resides in Altavista, Virginia, but proposes to move to Hartsville if Sunshine's application is granted. Sunshine Exhibit 3, p. 2.

15. From 1957 to 1958 Gray was an announcer and sales person at WYTI, Rocky Mount, Virginia. From 1958 to 1960, he was an announcer and sales person at WBLT, Bedford, Virginia. From 1960 to 1962, he worked at WSLS, Roanoke, Virginia, in sales. Sunshine Exhibit 3, p. 3. In 1962, Gray purchased WKDE AM/FM, Altavista, Virginia, and worked as General Manager there from 1962 to 1969 and 1970 to 1979. He sold those stations in 1982. *Id.* In 1967, Gray bought WAKS, Fuquay, North Carolina, and worked there as General Manager from 1969 to 1970, while he was also operating WKDE AM/FM. He sold WAKS in 1970. Sunshine Exhibit 3, p. 3; Tr. 255. In 1981, Gray bought WFLB, Fayetteville, North Carolina, and worked as that station's General Manager from 1982 to 1984. *Id.* In 1981, Gray also bought WSML, Graham, North Carolina. Sunshine Exhibit 3, pp. 2-3. He has been the station's full-time General Manager since June 1985. Tr. 256.[1]

Diversification

16. Gray is the 100% owner of Alamance, licensee of AM Station WSML, Graham, North Carolina. WSML operates daytime only at the current time, but has a construction permit for full-time operation at 10 kW day and 1 kW night. Sunshine Exhibit 1, p. 1; Tr. 114, 116, 144-45. Graham, with a population of 8,500 is located about 110 to 125 miles from Hartsville. Tr. 231-32. Burlington, a community contiguous to Graham, has a population of 50,000. Tr. 232. Graham has a weekly newspaper, *The Alamance News*. Gray testified that newspaper has "no affect on the market." *Id.*

17. Orr has no current interest in any medium of mass communications. However, he was the sole owner of WCRE(AM), Cheraw, South Carolina, as of the last date for amendments as of right. Sunshine Exhibit 1, p. 1. He did not make a timely pledge to divest that station in the event Sunshine's application was granted. Accordingly, Sunshine must be attributed with Orr's 100% ownership of WCRE. WCRE operates with 1 kW day, 97 watts night. Tr. 600. It is one of two stations located in Cheraw, a community with a population of 6,000 located 37 miles from Hartsville. Tr. 600-01. Cheraw has one weekly newspaper. Tr. 601.

Auxiliary Power

18. Sunshine proposes to install and maintain auxiliary power generation facilities at the studio and transmitter sites. Sunshine Exhibit 1, p. 2.

HARTSVILLE BROADCASTING CO., INC.

19. HBC is a South Carolina corporation organized in June 1945. HBC was granted a construction permit for WHSC(AM), Hartsville, South Carolina, on January 3, 1946. The station began operation on October 16, 1946. HBC has been the licensee ever since. HBC Exhibit 1, p. 1.

20. As of the time HBC's FM application was filed, and as of the filing of Integration and Diversification Statements on March 12, 1990, the officers, directors and voting stockholders of HBC were as follows:

Name	Ownership Percentage	Office Held	Director
C. Hugh Campbell	16.7%	President/ Treasurer	Yes
O.B. Lyles	0.0%	Vice President	Yes
Betty Wiggins	16.7%	Secretary	Yes
J. L. Wiggins	19.5%	None	Yes
F. L. H. Coker	24.7%	None	Yes
Charles H. Coker, Jr.	6.7%	None	No
Mrs. Mortimer Coker Hall	3.9%	None	No
James Coker, IV	3.9%	None	Yes
Mrs. James Coker, III	7.9%	None	No

HBC has no non-voting stockholders. *Id.*, pp. 1-2.

21. Subsequent to the filing of HBC's Integration and Diversification Statement, J. L. Wiggins resigned as a director of HBC and gave his stock in HBC to his adult son, Joseph L. Wiggins, Jr. Mr. Wiggins, Jr. has not been elected as either an officer or director of HBC. *Id.*, p. 2.

Integration

22. Hugh Campbell will be integrated on a full-time basis (*i.e.*, a minimum of 40 hours per week) as General Manager of HBC's proposed FM station. His work schedule for the station will be Monday through Friday, 8:00 a.m. to 6:00 p.m., with 90 minutes for lunch. As General Manager, Campbell will supervise all aspects of station operations, including programming, sales, financial matters and employment. HBC Exhibit 2, p. 1.

23. Campbell initially acquired stock in HBC in 1952. He acquired additional stock in 1964 and 1981. He has been an officer and director of the corporation since 1963 and president since 1985. HBC Exhibit 2, p. 4. Since April 1, 1989, Campbell has been General Manager of WHSC.

24. In light of the fact HBC has pledged to divest WHSC prior to commencing program tests on the FM station (*see* ¶ 28, *infra*), Campbell will be free to work full-time as General Managaer of the FM station. His only other business pursuit is the rental of certain commercial properties, which occupies not more than two hours of his time per week. Campbell will handle his affairs with respect to his rental properties during evening hours, on weekends and during his luncheon periods. *Id.*

25. Campbell was born in Hartsville, South Carolina, and has lived there all of his life except for the period of time from 1944 to 1948, when he attended the University of the South at Sewanee, Tennessee, and from 1958 to 1961, when he resided in Atlanta, Georgia. *Id.*, pp. 1-2. He resided within the city limits of Hartsville from 1961 to 1988. Tr. 769. His residence since 1988 has been 212 Sweet Bay Drive, which is located a few hundred feet outside the corporate limits of Hartsville, but has a Hartsville postal address. Campbell will continue to reside there while integrated at the Hartsville FM station. HBC Exhibit 2, p. 2.

26. Over the years, Campbell has participated in various civic activities and organizations in Hartsville, to include the following:

(a) Hartsville Kiwanis Club. Campbell has been a member for approximately 30 years and has participated for at least the last ten years in the organization's major charitable fund-raising activity, an annual barbecue. The funds raised are used for various charitable activities, with the major beneficiary being a day camp for handicapped children. The money raised also is used to fund a scholarship at Coker College in Hartsville. He was president of the club for one year, in 1969-1970, and was lieutenant governor of the Carolinas District of Kiwanis for one year in the early 1970s. He also regularly attends the organization's weekly luncheon meetings. *Id.*

(b) Coker College City Campaign. The City Campaign raises money in the community and precedes the College's regular fund-raising campaign. Campbell participated this year as a member of the Steering Committee. His responsibilities were to recruit volunteers for the campaign. In that regard, he called on various individuals to encourage them to join the campaign. He also attended four meetings (approximately 90 minutes each) between February and April, 1990. *Id.*

(c) Hartsville Downtown Development Association. Campbell has been a director of this organization since about May 1989. He has attended approximately ten monthly meetings, each of which is approximately 90 minutes in length. In addition, he is on the Promotions Committee, which organizes several projects each year. For example, one of the projects was the "HartsCapades," a four-day festival in Hartsville. He was involved in selling to area merchants special bags printed with a "HartsCapades" logo. *Id.*, p. 3.

(d) American Red Cross, Hartsville Chapter. Campbell was a director of the chapter for approximately two years in the mid-1960s. *Id.*; Tr. 770-71.

(e) National Foundation for Infantile Paralysis, Darlington County Chapter. Campbell participated in the chapter's activities for approximately four years in the early 1960s, and was chairman for two years during the same period. HBC Exhibit 3, p. 3; Tr. 771.

27. Since April 1, 1989, Campbell has been the full-time General Manager of WHSC. As General Manager, he supervises all aspects of station operation, including programming, sales, financial matters and employment. He also prepares and presents "Sounding Board," a live public affairs program broadcast on WHSC. HBC Exhibit 2, p. 3.

Diversification

28. WHSC is a Class IV AM station operating on 1450 kHz with one kilowatt ERP day and night. If the proposed application is granted, it will divest WHSC prior to commencing program tests on the FM station. HBC Exhibit 1, p. 2.

29. Betty Wiggins is vice president, secretary, a director and 3% owner of Hartsville Publishing Co., Inc. publisher of *The Hartsville Messenger*, a twice-weekly newspaper. Former HBC stockholder J. L. Wiggins is president, treasurer, a director and 97% owner of Hartsville Publishing Co., Inc. *Id.*, pp. 2-3. J. L. Wiggins is the spouse of Betty Wiggins. Sunshine Exhibit 7, p. 4.

30. Hartsville has three non-daily newspapers. Each includes editorial content (*i.e.*, news stories) and photographs, as well as advertising. *Id.*

31. *The Hartsville Messenger* is published twice a week, Mondays and Wednesdays. Its circulation area is Darlington County and parts of Chesterfield County, South Carolina. The total average 1990 circulation for Monday editions is 5,480 (4,780 paid; 700 unpaid). The average 1990 circulation for Wednesday editions is 7,484 (6,784 paid; 700 unpaid). *Id.*; Tr. 744.

32. *The Darco News and Buyers Guide* is published weekly and circulated primarily in Darlington County. It is distributed free and has a circulation of approximately 14,000. *Id.*; Tr. 747.

33. The *Hartsville Morning News* is delivered in the greater Hartsville area on Fridays. Its paid circulation is 2,500. On the first Friday of every month, 4,500 copies are delivered to Hartsville-area subscribers of the *Florence Morning News*. *Id.*, p. 4; Tr. 748.

34. Three daily newspapers have regular circulation in Darlington County. The *Florence Morning News* has a daily and Sunday circulation in Darlington County of 6,200. *The State*, a newspaper published in Columbia, South Carolina, has a daily circulation in Darlington County of 2,962 and a Sunday circulation of 3,140. *The Charlotte Observer*, published in Charlotte, North Carolina, has a daily circulation in Darlington County of 455 and a Sunday circulation of 571. HBC Exhibit 1, p. 4.

35. The 1 mV/m contour of HBC's proposed Hartsville FM station will cover about 82.2% of the area and 85% of the population of Darlington County. Joint Stipulation No. 2.

36. Other than as reflected above, neither HBC nor any of its principals hold ownership interests in or have official positions with any other broadcast station or mass media outlet. *Id.*

Auxiliary Power

37. HBC owns an auxiliary power generator which it will use to allow the FM station to remain on the air even in the event of loss of regular power. HBC Exhibit 3.

QUALIFICATION ISSUES - SUNSHINE

Financial

38. Sunshine intends to rely on Gray and Orr as the source of its funds to construct and operate the proposed station. Financial issues were added stemming from the following: (a) unpaid tax liens against Alamance Broadcasting Company; (b) questions raised whether Gray and Orr had an agreement as to sharing of costs; and (c) apparent failure of Gray and Orr to review each other's financial statements prior to certification.

Application Certification

39. On June 25, 1987, Sunshine filed its application for the Hartsville FM station. Gray, on behalf of Sunshine, certified that Sunshine was financially qualified to construct and operate the station for three months. HBC Exhibit 5.

40. Prior to filing the application, Gray prepared a construction and operating budget. Sunshine estimated a cost of $25,000 for construction and $14,010 for three months operation. Gray proposed used equipment which he has found readily available, and obtained quotes from sources he used in the past, such as Armstrong Transmitter Corporation. Gray based the budget on his years of experience in broadcasting and his construction of a similar station in Appamatox, Virginia. Sunshine Exhibit 5.

41. Orr was also personally involved in obtaining some of the cost estimates for the Hartsville station. Specifically, he personally checked into the cost of renting studio space in Hartsville and negotiated a tower site lease payment of $100 per month for the first six months. He also contributed to the development of the budget in other areas, based on his experience with WCRE. Orr discussed the cost of equipment and the initial operating budget with Gray as well. Sunshine Exhibit 4, Tr. 510-511. Orr, a licensed South Carolina Residential Home Builder, will do any remodeling, construction and electrical wiring for Sunshine's station free of charge. Sunshine Exhibit 5, p. 18.

42. Sunshine proposed to rely on Gray and Orr as its source of funds to meet its projected costs. Prior to the filing of the application, Orr and Gray verbally agreed to share equally in the costs for the preparation and prosecution of the Hartsville application, as well as for the construction and first three months operation of the station. Sunshine Exhibits 4, 5; Tr. 125, 511-512, 536-537. In fact, since the filing of the application, Orr and Gray have each paid one half of the costs of prosecuting Sunshine's application. Tr. 182-183, 514. All funds to pay prosecution expenses have come and will come out of the current income of Gray and Orr. Tr. 186. It was also verbally agreed, prior to the filing of the application, in April or May 1987, that if Orr was unable to come up with the necessary funds to meet his 50% contribution, Gray would loan Orr the money which Orr would, in turn, loan to Sunshine. Tr. 125-126, 540-541.

43. At the time Sunshine's application was being prepared in 1987, Gray and Orr had been working together in constructing houses. Both individuals prepared financial statements for the presentation to banks in connection with construction loan applications, and each saw the other's financial statement, in the early part of 1987. Tr. 125, 161-162, 295, 514, 559. Gray believed, on the basis of Orr's 1987 financial statement, that Orr would be able to

meet his commitment to provide half the funds to Sunshine for the Hartsville station. Sunshine Exhibit 5, p. 1. Moreover, Gray personally had sufficient funds in 1987 to fund the entire construction and operating costs of the Hartsville station, should that become necessary. Gray's 1987 balance sheet showed cash in the amount of $8,712 and identified holdings in publicly traded securities amounting to over $500,000. His liabilities totalled $31,000. Sunshine Exhibit 5, HBC Exhibit 13.

44. Orr had planned to obtain his portion of the funds from his cash on hand, a loan of $30,000 from the South Carolina National Bank, based on the equity in his house, and from a loan of $5,000 from his wife. Sunshine Exhibit 4, p. 1; Tr. 512. Orr, however, failed to sustain the availability of such funds at the time of certification. In this connection, after failing to call the bank official to testify as to the $30,000 bank loan, Sunshine withdrew reliance on the bank loan. Tr. 706. However, Orr's failure to show he had the necessary funds in 1987 to meet his share of the costs does not affect the validity of Sunshine's financial certification. As discussed, *supra*, Gray had agreed to loan Orr the necessary funds to meet his share of the costs and had demonstrated the ability to cover such expenses. *See* Findings 42, 43.

Tax Liens

45. On May 5, 1989, a "Notice of Federal Tax Lien Under Internal Revenue Laws" (Notice) was filed against Orr Broadcasting, Inc. (OBI), then licensee of WCRE, Cheraw, South Carolina and a corporation wholly-owned by Michael Orr. HBC Exhibit 23; pp. 1-2; Sunshine Exhibit 1, p. 1. That Notice revealed that, on November 23, 1987, OBI was assessed $57.95 for unpaid federal withholding taxes for the period ending December 31, 1986. HBC Exhibit 23, p. 1. Orr explained that the lien for "$57.95 reflected an underpayment during the tax period in issue. That Notice also indicates that on March 13, 1989, OBI was assessed, for the tax period ending September 30, 1987, $2,147.13 for unpaid withholding taxes. HBC Ex. 23, p. 1. The total amount of the lien, $2,205.08, was paid and the lien released on June 13, 1989. *Id.*, p. 3. Orr testified that the second lien, for $2,147.13, was due to the fact that a check for payment of those taxes was lost in the mail. Tr. 582, 587-589.

46. On May 17, 1989, May 31, 1989 and January 31, 1990, a total of four Notices of Federal Tax Liens were filed against Alamance, covering a total of $3,638.81 in assessments for all of the quarterly tax periods in 1987, three quarterly tax periods in 1988, and three quarterly tax periods in 1989. All liens were for balances or assessments relating to federal withholding taxes. HBC Exhibit 7. Gray testified the liens are the result of a dispute with the IRS over whether Alamance had paid its federal withholding taxes on time. Tr. 288-289. He said the corporation had paid the taxes themselves and the amounts are for penalties and interest. Gray refuses to pay the liens because of his duspute with the IRS. *Id.*

Filing of Socastee Application

47. In December 1987, Sunshine filed an application for a new FM broadcast station at Socastee, South Carolina. In that application Sunshine certified that it was financially qualified. Tr. 130-131, 206. Orr and Gray had estimated that the cost for constructing and initially operating that station would be approximately $75,000 - $80,000, although no formal written budget was prepared. Tr. 131, 552.

48. Gray and Orr had agreed to share equally in the expenses for the Socastee application, construction and operation. However, as Orr had limited finances, Gray agreed to loan Orr the necessary funds personally, so Orr could lend Sunshine 50% of its Socastee costs. Tr. 170, 552-554. Gray had adequate funds in his own name to construct and operate both the Hartsville and Socastee stations for 90 days. Tr. 132. The Socastee application was received after the filing deadline at the Commission and was never accepted. A petition for reconsideration of its dismissal was denied in April 1988. Tr. 556.

Sunshine's Current Financial Qualifications

49. Sunshine's revised budget, dated August 22, 1990, estimates total costs at $61,629. Sunshine estimates it will require $42,560 to construct the station and $19,069 to operate the station for three months without revenue. Sunshine Exhibit 5, pp. 13-14.

50. To meet these costs, Sunshine will rely on Gray and Orr. Gray will, however, contribute only $25,000, to construction and initial operating costs; Orr will contribute $60,000. Tr. 135, 222-223, 514, 541. Gray and Orr will continue to share equally the prosecution expenses. Tr. 594-595. Gray's financial posture changed in approximately May 1990 when he began selling off his assets to finance the construction of his 10,000 watt, four tower directional array at station WMSL, Graham, North Carolina. Tr. 179-182.

51. Gray proposes to rely on a $25,000 loan from his mother. The loan letter dated August 22, 1990 provides that the loan is payable over 36 months at interest of 8% with first principal and interest payments due 12 months from the date the loan was made. The source of the funds to be loaned to Gray are certificate of deposit in the amounts of $15,000 and $10,500. Sunshine has provided evidence of the existence of such funds. Sunshine Exhibit 5, pp. 9-11. However, Sunshine has not submitted a financial statement for Mrs. Gray. In the absence of information as to Mrs. Gray's liabilities, no determination can be made as to whether she has sufficient net liquid assets to cover the loan.

52. To meet his $60,000 commitment, Orr proposes to rely on the following sources: a $30,000 bank loan from the South Carolina National Bank, an $8,000 loan from his wife, Patsy Orr, and a $22,000 loan from his parents, Marvin and Marilyn Orr. Sunshine Exhibit 4.

53. The $30,000 from the bank loan will be credited. Orr's loan commitment is evidenced by bank letters dated August 7, 1990 and September 6, 1990 signed by J. D. Yarborough, Asst. Vice President. The letters establish that Orr has done business with the bank for a number of years and has compiled an excellent financial record. Further, the letters provide the amount of the loan, the interest rate, the repayment terms, and the collateral. The collateral will be a second mortgage on the Orr residence and the personal guarantees of the Orrs, which they have agreed to provide. The Orr property already is encumbered by a second mortgage. However, the September 6 letter increases the loan amount to $36,000. Of the amount borrowed, approximately $4700 would be used to pay off the existing second mortgage, to be done at the closing of the bank loan. The bank letter also notes that

the bank has received an acceptable appraisal of Orr's residence, appraising the property at $128,400. Sunshine Exhibit 4, pp. 7-9; Sunshine Exhibit 9; Tr. 465-466.

54. Funds for the $8,000 loan from Mrs. Orr to her husband are to come from her retirement account and her savings account. Sunshine Exhibit 4, pp. 4-6; Tr. 467. As of March 31, 1990, Patsy Orr had a balance of $7,310 in her retirement account. Sunshine Exhibit 4, p. 5. She had a balance in her savings account of $748. Sunshine Exhibit 4, p. 6. Her commitment states that no interest will be charged and no collateral will be required. The loan is to be repaid one year after the station goes on the air. Sunshine Exhibit 4, p. 3. Sunshine, however, has not provided a financial statement for Mrs. Orr.

55. Marvin and Marilyn Orr propose to lend Michael Orr $26,000 for use in construction and operation of the Hartsville station. Sunshine Exhibit 4, pp. 10-11; Tr. 472, 492, 501. No collateral will be required, no interest will be charged, and repayment need not be made until the station has been on the air for a year. Sunshine Exhibit 4, p. 11. The Orrs will obtain the funds for their loan from accounts at the Wachovia Bank ($6,544), Ecusta Employees Credit Union ($6,780 and $11,172) and at the First Union Bank ($2,134). The balances total $26,630. Sunshine Exhibit 4, pp. 11-15. Sunshine, however, has not provided a financial statement for Orr's parents. In the absence of information as to the liabilities of his parents and Orr's wife, it is not possible to ascertain whether they have sufficient net liquid assets to cover the loans. As in the case of Mrs. Gray, their loan commitments will not be credited.

Transmitter Site Misrepresentation

56. Sunshine originally proposed to locate its transmitter on property owned by Woodrow Hall near the Darlington Raceway Dragstrip. HBC Exhibit 5; Tr. 119. A controversy arose over the use of that site because of its proximity to a private airport owned by an adjacent land owner, Warren Curry. Tr. 119-20, 439. Curry brought a law suit against Sunshine to bar construction of the tower at that site and, as a result, Sunshine attempted to amend its application to specify a new site in order to avoid litigation with Curry. Curry dismissed his law suit based upon the filing of that amendment. Tr. 440. The Commission, however, subsequently refused to accept Sunshine's proposed amendment, forcing Sunshine to return to its original site proposal, *i.e.*, the property adjoining Curry's airport. Tr. 120, 440. In approximately February 1990, Curry brought a second law suit against Sunshine to bar construction of the tower. Tr. 440-441.

57. In March 1990, Sunshine retained T. Furman Brodie to represent it with respect to the second Curry law suit. Brodie had not represented Sunshine with respect to the first law suit. Sunshine Exhibit 6; Tr. 439-440. Brodie communicated with Curry's counsel, Sidney S. Tison, Jr., in an attempt to defer the local litigation pending resolution of the FCC hearing. Tr. 443. Brodie believed that it made sense to defer trial of the suit until after the conclusion of the proceedings before the Commission, since Sunshine was not able to build the tower until it received the construction permit. He knew that it could be a long time before the FCC process would be over, and many things could happen during that time which would affect possible resolution of the controversy. Sunshine Exhibit 8; Tr. 443-444, 519.

58. Brodie wrote a letter dated March 26, 1990 to Tison. HBC Exhibit 20. In that letter, Brodie said:

> As I mentioned to you it appears to me that this case is not ripe for adjudication. Sunshine Broadcasting previously agreed to move their antenna to another site. They conducted the necessary engineering studies and petitioned the FCC for leave to amend their application for a construction permit. This petition to amend their application was denied by the FCC.
>
> The proceedings before the FCC are a somewhat bifurcated transaction. Sunshine Broadcasting as well as Hartsville Broadcasting have applied for the new license to be granted in Hartsville. This matter is scheduled for a comparative hearing before the FCC. Pending this comparative hearing the FCC allows only limited amendments to an application. This is done to finalize the application process and allow the FCC to make a decision among the various applications filed for each license. Until the comparative hearing is held and Sunshine Broadcasting is granted a construction permit they are not authorized to build the tower in question.
>
> Once, and if, Sunshine Broadcasting is granted the construction permit, they can then file to build their tower at another location as a matter of right. *They have agreed that if this application is granted that they will build the tower at another location subject to FCC approval.*
>
> I understand your desire in not wanting to have this case dismissed a second time. However, it does not appear to me that we have anything to adjudicate until the FCC proceedings are finalized. I do not think it is advisable for either of our clients to spend the money on our fees involved in discovery and litigation until it is determined that we have something to fight over. It further appears to me that we can not enter into a meaningful settlement agreement which would serve the interest of both sides in this controversy until the FCC proceedings are completed.

Id. (emphasis added). The issue was added because of the Presiding Judge's concern that the above statement indicated that Sunshine did not intend to build its tower at the location specified in its application.

59. Brodie testified that he did not discuss the March 26, 1990 letter with Sunshine before he sent it; he did not inform them that he was sending this specific letter, or its contents. Tr. 441-442. Gray first saw Brodie's March 26 letter when he received HBC's petition which contained a copy. Tr. 299-300, 301. Orr first saw that letter at the first set of depositions, in May, 1990. Tr. 519. Neither principal was aware of the contents of the letter before it was sent. Tr. 520. Brodie did tell Gray, at the time he wrote the letter, that he was writing to seek a deferment of the case until after the FCC had decided whether Sunshine would get the grant. Tr. 300, 311.

60. Brodie stated that, prior to sending the March 26 letter, he attempted to explain to Curry's attorney why the Commission did not accept Sunshine's amendment to change tower site. Tr. 444. He further explained that the statement quoted above was taken out of context, that it should have stated that Sunshine had previously agreed to

change its tower site, referring to its amendment. Brodie noted that if Sunshine had then agreed to change its tower site, the litigation with Curry would have been settled, and there would be no dispute. Tr. 444. Brodie stated that his letter was not intended to indicate any intention other than that Sunshine currently intends to construct its tower at the location indicated in its application. Sunshine Exhibit 8. Brodie was not authorized by his client and did not discuss with Curry's lawyer Sunshine's moving to a different site. Tr. 100-101, 301, 443-444.

61. Sunshine currently intends to construct its tower at the site specified in its original application, and has had that intent ever since the Commission rejected its amendment. Tr. 301, 517, 520. If Sunshine obtains the permit, but is unable to use its tower site, only then will it seek to move to another site. Tr. 307, 312.

CONCLUSIONS

Qualification Issues - Sunshine

Financial

62. The requirements for financial certification have recently been summarized by the Review Board in *Scioto Broadcasters*, 5 FCC Rcd 5158, 68 RR 2d 195 (Rev. Bd. 1990). Citing *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-5519 (1989), the Board noted

> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evident that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of finds to meet these estimated expenses, the applicant must provide substantial net liquid assets on hand . . .

The record reflects that Sunshine fully satisfied the Commission's requirements at the time it certified it was financially qualified.

63. Before filing its application, Sunshine's principals Gray and Orr both participated in determining the cost of constructing and operating the Hartsville station for three months without revenue. Gray is an experienced broadcaster who had built and operated stations for many years. He drew on that experience in preparing the Hartsville budget. Gray obtained equipment quotations from recognized and reliable sources he had used in the past. Orr, also an experienced broadcaster and a person familiar with construction costs from his home-building business, obtained estimates of office rentals in Hartsville for the studio rental and negotiated the cost of leasing the transmitter site. He discussed the entire construction and operating budget with Gray. Sunshine Exhibit 4, Tr. 510-511. Accordingly, Sunshine has met the first test quoted above; it has "engaged in serious and reasonable efforts to ascertain predictable construction and operation costs."

64. Sunshine has also met the second part of the test enunciated in *Northampton*. Sunshine proposed to rely on its principals, Gray and Orr, as its source of funds to meet its projected costs of $39,010 for construction and three months operation. Prior to the filing of the application, Orr and Gray verbally agreed to share equally in these costs. It was also verbally agreed that Gray would loan Orr the necessary funds if Orr could not meet his commitment to Sunshine. Sunshine failed to show that Orr had the needed funds to meet his commitment. However, such failure does not affect the validity of Sunshine's financial certification since Gray personally had sufficient funds in 1987 to fund the entire construction and operating costs of the proposed station. In this connection, Gray's 1987 balance sheet showed liquid assets of over $500,000 and liabilities totalling $31,000. Even assuming Sunshine's construction costs were understated, as urged by HBI, although unproven, it is clear that Sunshine had more than ample funds to meet such costs. It is thus concluded that Sunshine did not misrepresent facts in certifying it was financially qualified at the time it filed its application in June, 1987.[2]

65. The record further establishes that the 1989 tax liens filed against Orr Broadcasting, Inc. and the 1989 - 1990 tax liens filed against Alamance Broadcasting, Inc., Gray's wholly owned company did not have any impact on Sunshine's financial qualifications. Similarly, Sunshine's financial ability to construct its Hartsville station was not adversely affected by its application, which was not accepted, filed December, 1987 for a new FM station at Socastee, South Carolina. Sunshine had sufficient funds to implement the Socastee proposal, based on Gray's personal assets. Gray was prepared to fund the entire amount required, and his balance sheet demonstrated that he could meet the financial requirements of both stations.

66. Sunshine, however, is not currently financially qualified. Sunshine's revised estimated construction and initial operating costs total $61,629. Sunshine plans to borrow $85,000 from Gray and Orr, giving it a cushion of $23,371. Gray will loan $25,000 to Sunshine; Orr will loan $60,000. However, Sunshine has only demonstrated the availability of a $30,000 bank loan to Orr. For the remainder of the money, Gray and Orr are relying on loans from individuals. Sunshine has failed to demonstrate that any of these individuals -- Mable Gray, Patsy Orr, or Marvin and Marilyn Orr -- have sufficient net liquid assets to make their respective loans. The law is crystal clear that where the lender is not a financial institution, a showing must be made that the lender has sufficient net liquid assets to cover the proposed loan. *Northampton Media Associates*, 4 FCC Rcd 5517, 5519 (1989); *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3198 (Rev. Bd. 1990). Sunshine did not meet this prerequisite. It did not provide documentary evidence such as a balance sheet or financial statement for any of the proposed lenders. Without the total of $55,000 proposed to be borrowed from those individuals, Sunshine is clearly not financially qualified.

67. Sunshine urges that "[w]ith earmarked funds, there is no need to scrutinize the balance sheet of the borrower,"[3] citing *Cannon's Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983). While that is true, that does not eliminate the need to scrutinize the balance sheets of the *individual* lenders. In fact, the Board in *Cannon's Point* specifically did analyze the balance sheets of individual lenders, noting that if the lenders had been shown to have the necessary funds available and the funds were earmarked for broadcast construction, the borrower's financial statement would be irrelevant. 93 FCC 2d at 646-647. Since Sunshine has not demonstrated that its individual lenders have sufficient net liquid assets to make the loans

proposed, it has not shown a reasonable assurance of the availability of loans from those individuals. *Northampton, supra*; *Aspen, supra*. Therefore, Sunshine is not financially qualified.

Site Misrepresentation Issue

68. This issue was added because of a concern that Sunshine did not intend to build its tower at the location specified in its application. This concern stemmed from language in a letter written by Sunshine's attorney, T. Furman Brodie to the lawyer representing Warren Curry, who brought a law suit against Sunshine to bar construction of the tower. The record makes clear that Brodie did not discuss the March 26, 1990 letter with Sunshine before he sent it and that Sunshine's principals were not aware of its contents until HBC filed its petition to enlarge on April 24, 1990. Moreover, Brodie's testimony makes clear the statement in dispute was taken out of context and should have stated that Sunshine had previously agreed to change its tower site referring to its amendment, which was denied by the Commission's staff. Brodie noted, in this regard there would be no continuing dispute and no litigation if Sunshine agreed to abandon its present tower site. The record also makes plain that Sunshine's principals did not authorize Brodie to discuss a change in tower site and that no change in tower site is currently contemplated. In this connection, HBC offered no evidence of any understanding or even discussions by Sunshine's principals with a prospective site owner. It is therefore concluded, on the basis of the unrebutted record, that Sunshine has not misrepresented or lacked candor with respect to its site specification. The issue is resolved in favor of Sunshine.

Comparative Issue

Diversification

69. The appropriate weight to be given media interests varies according to the type of media, size of ownership interest, and the impact of that media on the community of license and the proposed service area. *Caldwell Broadcasting Corp.*, 104 FCC 2d 438, 439 (1986). Ownership of small mediums of expression, such as weekly newspapers with less frequent publication, have less significance than other broadcast interests. *Caldwell, supra*; *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394-395; *Barton Broadcasting*, 104 FCC 2d 785 (Rev. Bd. 1986; *Achernar Broadcasting Company*, 5 FCC Rcd 6309, 6312 (Rev. Bd. 1990).

70. Here, Orr and Gray, who each hold a 41% interest in Sunshine, own 100% interests in broadcast stations. Orr's WCRE is located in the same state as Hartsville, 37 miles away. It is one of two stations in Cheraw. Gray's station is located 110-125 miles away, in a neighboring state. Under these circumstances, Sunshine is assessed a substantial diversification demerit. *Simon Geller*, 102 FCC 2d 1443, 1450-1452 (1985); *Billie D. Pirtle*, 43 FCC 2d 670, 671 (Rev. Bd. 1973).

71. Two of HBC's non integrated principals who hold a combined ownership interest of 36.2% in HBC[4] together own the Hartsville Publishing Co., publisher of *The Hartsville Messenger*, a twice weekly Hartsville newspaper. The average 1990 circulation for *The Hartsville Messenger* is less than 5500 on Mondays, less than 7500 on Wednesday. *The Hartsville Messenger* is one of three non-daily newspapers in Hartsville. There are three daily newspapers with regular circulation in Darlington County. On the basis of these facts, HBC warrants a very slight diversification demerit. *Barton, supra*; *Achernar, supra*; *Big Bend Broadcasters*, 96 FCC 2d 166, 168-170 (Rev. Bd. 1983).[5]

Integration

72. Sunshine proposes the full time integration of Gray and Orr, whose ownership for this purpose, is limited to 58.4%. The integration proposal will be credited. HBC contends that Gray's integration proposal should not be credited because of the time spent by Gray in his brokering activities. However, most of Gray's brokering is done on the weekends and on the telephone at night. There is no evidence indicating that such activity will impede his ability to fulfill his full time commitment. HBC is entitled to 16.7% full-time integration credit for Campbell's proposal to serve as full-time general manager. The quantitative difference of 41.7% between Sunshine and HBC are of too great a magniture to be overcome by qualitative attributes. *See New Continental Broadcasting Company*, 88 FCC 2d 830, 850 (Rev. Bd. 1981). Sunshine merits a moderate integration preference. *Martin Intermart*, 3 FCC Rcd 1650, 1652 (Rev. Bd. 1988); *Pittsfield Community Television Association*, 56 RR 2d 124, 126 (Rev. Bd. 1983).[6]

73. *In summary*, Sunshine is disqualified since it has failed to show it possesses the requisite financial qualifications. Even if this were not so, HBC would be the winner under applicable comparative criteria. HBC has been awarded a moderate to substantial diversification preference while Sunshine enjoys a moderate integration preference. It is a long-held Commission policy that diversification is afforded greater comparative weight than integration. *Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 1202 (Rev. Bd. 1983). That being so, even if the two preferences were equal in amount, which is not the case here, the applicant with the diversification preference would prevail. Therefore, HBC's application will be granted.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[7] the application of Sunshine Broadcasting, Inc. for a new FM Station on Channel 253 in Hartsville, South Carolina IS DENIED; and the application of Hartsville Broadcasting Co., Inc. IS GRANTED subject to the following condition:

> Hartsville Broadcasting Co., Inc. shall divest Station WHSC, South Carolina prior to the commencement of program tests on the FM station.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] Gray has owned other stations. However, he held no employment positions at such stations.

[2] HBI, pointing to discrepancies between the deposition and hearing testimony, urges that Sunshine exhibited a lack of candor and should be disqualified. The Presiding Judge concludes, however, that Sunshine's principals gave truthful testimony and that the record reveals no deliberate misrepresentation. Any errors or omissions, to the extent that they may exist at all, are not significant and do not impeach the validity of the testimony of either Gray or Orr. *See CIMA Broadcasting Limited Partnership*, 60 RR 2d 464, 467 (Rev. Bd. 1985). In this regard, no motive exists for Gray or Orr to misrepresent facts concerning Sunshine's financial certification in light of Gray's favorable financial position.

[3] Sunshine Findings, p. 27.

[4] The 16.7% interest of Betty Wiggins plus the attributable 19.5% interest of J. L. Wiggins.

[5] HBC's newspaper holding appears to be more significant than that found in *Barton*. *Barton* involved a weekly, rather than twice weekly newspaper of a specialized nature. In addition to two other weeklies, the community of Lubbock had a daily newspaper of general circulation. Achernar involved publication of two out of state weekly newspapers. HBC's newspaper holding appears to be closer to that found in *Big Bend* where the two owners of an FM applicant held a controlling interest in a weekly newspaper. Unlike *Big Bend*, however, the owners of the newspapers here do not own a controlling interest in the proposed station and are not proposed to be integrated.

[6] There are no other comparative factors to be considered. Neither of the applicants seeks a preference under the comparative coverage factor. Also both propose auxiliary power.

[7] In the event exceptions are not filed within 30 days after the release of this initial decision, and the Commission does not review the case on its own motion, this initial decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FOX BROADCASTING COMPANY — MMB File 900130A

Order Extending Waiver of
Certain Provisions of
47 C.F.R. § 73.658

ORDER

Adopted: May 6, 1991; **Released: May 7, 1991**

By the Commission: Chairman Sikes concurring in the result.

1. On May 8, 1990, the Commission released a *Memorandum Opinion and Order*, 5 FCC Rcd 3211 (1990), granting Fox Broadcasting Company (FBC) a limited, temporary and conditional waiver of Section 73.658(j)(4) of our Rules[1] effective for one year or until the effective date of a *Report and Order* in MM Docket No. 90-162, whichever occurred first.

2. On April 9, 1991, the Commission decided to relax the financial interest and syndication rules and change the network definition. A *Report and Order* in this proceeding is forthcoming. Accordingly, in order to avoid undue confusion and disruption of operations in the period between the expiration of the waiver and the effective date of the rule changes in MM Docket No. 90-162, IT IS ORDERED, That the waiver adopted in MMB File 900130A IS EXTENDED until the effective date of the rule changes in the *Report and Order* in MM Docket No. 90-162. All terms of the waiver remain unchanged.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *Memorandum Opinion and Order* in MMB File 900130A, 5 FCC Rcd 3211 (1990). Section 73.658(j)(4), for purposes of applying the financial interest, syndication, and Prime Time Access rules, defines network to be any entity that provides 15 hours of television programming per week on an interconnected basis to 25 or more affiliates in 10 or more states. The waiver permitted Fox to provide an additional 3 1/2 hours of weekly programming on an interconnected basis beyond the network threshold of 15 hours.

Before the
Federal Communications Commission
Washington D.C. 20554

MM Docket No. 91-8

In the Matter of

Amendment of Section 73.202(b), RM-7299
Table of Allotments,
FM Broadcast Stations.
(Appomattox, Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 3, 1991; Released: May 17, 1991

By the Chief, Allocations Branch:

1. At the request of LBS Broadcasting, Inc. ("petitioner"), licensee of Station WZST(FM), Channel 274B, Appomattox, Virginia, the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 589 (1991), proposing the substitution of Channel 274C1 for Channel 274B at Appomattox, Virginia, and the modification of its license to specify operation on the higher powered channel. Petitioner filed supporting comments. No other comments were received.

2. Petitioner reiterates its intention to apply for Channel 274C1, if allotted to Appomattox. In addition, petitioner states its willingness to share in the reimbursement to WYAL Radio, Inc., permittee of Station WWRT(FM), Channel 274A, Scotland Neck, North Carolina, for the reasonable costs associated with the station's recent channel change from Channel 274A to Channel 238A. [1]

3. We believe the public interest would be served by substituting Channel 274C1 for Channel 274B at Appomattox, Virginia, since it would enable Station WZST(FM) to expand its coverage area. Channel 274C1 can be allotted to Appomattox in compliance with the Commission's minimum distance separation requirements with a site restriction of 4 kilometers (2.5 miles) southeast to accommodate petitioner's desired transmitter site. [2] As proposed, we will also modify petitioner's authorization for StationWZST(FM) to specify operation on Channel 274C1 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 1, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Appomattox, Virginia	274C1, 296A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of LBS Broadcasting, Inc. for Station WZST(FM), Appomattox, Virginia, IS MODIFIED to specify operation on Channel 274C1, in lieu of Channel 274B, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1]In the *Notice*, we stated that the Commission had issued a *Report and Order* in MM Docket No. 90-473, 6 FCC Rcd 388 (1991), substituting Channel 238A for Channel 274A for Station WWRT(FM) at Scotland Neck, North Carolina, as a component of proposal filed by Lawrence F. and Margaret A. Loesch ("the Loeschs") to substitute Channel 273C3 for Channel 272A at Edenton, North Carolina. As stated in the *Notice*, WYAL Radio, Inc. would be entitled to reimbursement for the costs associated with the channel conversion and those costs are to be shared by this petitioner and the Loeschs.

[2]The coordinates for Channel 274C1 at Appomattox are North Latitude 37-19-55 and West Longitude 78-47-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-282

In the Matter of

Amendment of Section 73.202(b),	RM-6630
Table of Allotments,	RM-7002
FM Broadcast Stations.	RM-7003
(Whiting, DePere, Crandon, Algoma,	RM-7004
Brillion, Mishicot, Ripon, Lomira,	
Sheboygan and Oshkosh, Wisconsin)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 7, 1991; Released: May 17, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 4 FCC Rcd 4970 (1989), proposing the substitution of Channel 244C2 for Channel 244A at Whiting, Wisconsin, and the modification of the license of Station WYTE, Channel 244A, Whiting, Wisconsin, to specify operation on Channel 244C2. Wheeler Broadcasting, Inc. ("Wheeler"), licensee of Station WOMA, Channel 243A, Algoma, Wisconsin, filed a counterproposal and reply comments. Sharon Broadcasting Corporation ("Sharon Broadcasting"), licensee of Station WYTE, Whiting, Wisconsin, filed comments and reply comments. American Communications Company ("ACC"), licensee of Station WJLW, Channel 240A, DePere, Wisconsin, filed a petition for rule making on June 6, 1989, which we are considering as a counterproposal in this proceeding, and reply comments. ODON Communications Group I Limited Partnership ("ODON"), licensee of Station WUSW (formerly WAHC), Channel 244A, Oshkosh, Wisconsin, filed a petition for rule making which we are considering as a counterproposal in this proceeding, and reply comments. Sheboygan County Broadcasting Company, Inc., DeNovoCom, Inc., and Mishicot Broadcasting Corporation filed comments. Brillion Radio filed reply comments. Finally, on May 19, 1990, ODON, Sharon Broadcasting, Wheeler, and Brillion Radio filed a "Joint Supplement to Record and Request for Expedited Action." For the reasons discussed below, we are granting the proposed upgrades at Whiting, DePere, and Algoma, Wisconsin. To accommodate these upgrades, we are modifying station authorizations at Oshkosh and Brillion, Wisconsin, and substituting vacant channel allotments at Crandon and Mishicot, Wisconsin.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Sharon Broadcasting proposing the substitution of Channel 244C2 for Channel 244A at Whiting, Wisconsin, and the modification of its Station WYTE license to specify operation on Channel 244C2. In order to accommodate this upgrade, it was necessary for Sharon Broadcasting to propose the substitution of Channel 276A for the vacant Channel 244A allotment at Crandon, Wisconsin, and the modification of the license of Station WUSW (formerly WAHC), Channel 244A, Oshkosh, Wisconsin, to specify operation on Channel 245A.

3. In response to the *Notice of Proposed Rule Making and Order to Show Cause*, we are considering three counterproposals. The first counterproposal was filed by ODON, licensee of Station WUSW, Channel 244A, Oshkosh, Wisconsin, proposing the substitution of Channel 241C3 for Channel 244A at Oshkosh, and modification of its Station WUSW license to specify operation on Channel 241C3. To accommodate this upgrade, ODON proposed the substitution of Channel 246A for Channel 242A at Brillion, Wisconsin, and modification of the construction permit for Station WLWR, Channel 242A, Brillion, to specify operation on Channel 246A; the substitution of Channel 294A for Channel 241A at Ripon, Wisconsin, and modification of the license of Station WYUR, Channel 241A, Ripon, Wisconsin, to specify operation on Channel 294A; the substitution of Channel 293A for Channel 294A at Sheboygan, Wisconsin, and the modification of the license of Station WWJR, Channel 294A, Sheboygan, Wisconsin, to specify operation on Channel 293A; and the substitution of Channel 249A for Channel 294A at Lomira, Wisconsin, and the modification of the construction permit for Station WFDL, Channel 294A, Lomira, Wisconsin, to specify operation on Channel 249A. [1] The second counterproposal was filed by American Communications Company ("ACC"), licensee of Station WJLW, Channel 240A, DePere, Wisconsin, proposing the substitution of Channel 240C3 for Channel 240A at DePere, Wisconsin, and the modification of its Station WJLW license to specify operation on Channel 240C3. In order to accommodate this upgrade, ACC proposed the substitution of Channel 298A for Channel 242A at Brillion, Wisconsin, and the modification of the construction permit for Station WEZR (formerly WLWR), Channel 242A, Brillion, Wisconsin, to specify operation on Channel 298A; and the substitution of Channel 234A for vacant Channel 298A at Mishicot, Wisconsin. [2] In addition, ACC notes that its proposed upgrade at DePere would be short-spaced to the reference coordinates for the Channel 241A allotment at Peshtigo, Wisconsin. However, ACC also notes that there is one pending application for this allotment which would not be short-spaced to its proposed upgrade at DePere. ACC, therefore, requested a

[1]Sheboygan County Broadcasting Co., Inc., licensee of Station WWJR, Sheboygan, Wisconsin, and DeNovoCom, Inc., licensee of Station WYUR, Ripon, Wisconsin, filed comments concerning the proposed modifications of their respective licenses to accommodate the proposed Channel 241C3 upgrade at Oshkosh. Inasmuch as we are dismissing the Oshkosh upgrade proposal, we will not consider these comments.

[2]On July 6, 1989, Value Radio Corporation and Mishicot Broadcasting Corporation filed applications for the Channel 298A allotment at Mishicot, Wisconsin (File Nos. BPH-890706MB and BPH-890706MC).

change in the reference coordinates for vacant Channel 241A at Peshtigo to specify the site in the sole pending application for that channel. [3] The third counterproposal was filed by Wheeler Broadcasting, Inc. , licensee of Station WOMA, Channel 243A, Algoma, Wisconsin, proposing the substitution of Channel 245C3 for Channel 243A at Algoma, Wisconsin, and the modification of its Station WOMA license to specify operation on Channel 245C3. [4]

SETTLEMENT

4. On May 14, 1990, ODON, Sharon Broadcasting, Wheeler, and Brillion Radio Company filed the Joint Supplement to Record and Request for Expedited Action looking toward resolution of this proceeding. Pursuant to that agreement among the parties, ODON is withdrawing its proposal for a Channel 241C3 upgrade at Oshkosh, and agrees to the modification of its Station WUSW license to specify operation on Channel 245A. In turn, this permits the substitution of Channel 244C2 for Channel 244A at Whiting, Wisconsin, and the modification of the Station WYTE license to specify operation on Channel 244C2. To accommodate this upgrade, it is necessary to substitute Channel 276A for Channel 244A at Crandon, Wisconsin. The site restriction at Whiting and license modification at Oshkosh permits the substitution of Channel 244C3 for Channel 243A at Algoma, Wisconsin, and modification of the license of Station WOMA to specify operation on Channel 244C3. The settlement agreement also enables ACC to accomplish an upgrade of Station WJLW(FM), DePere, Wisconsin, from Channel 240A to Channel 240C3.

5. We believe that this settlement serves the public interest because it enables stations in Whiting, DePere, and Algoma to upgrade and provide their communities with wide coverage area FM service. At the same time, by substituting Class A channels at Oshkosh, Station WUSW will be able to increase its coverage area by operating as the equivalent of a 6kW, instead of a 3kW, station. Accordingly, we will substitute Channel 244C2 for Channel 244A at Whiting, Wisconsin, and modify the license for Station WYTE(FM) to specify operation on Channel 244C2. [5] To accommodate this upgrade, we will substitute Channel 245A for Channel 244A at Oshkosh, Wisconsin, and modify thelicense for Station WUSW to specify operation on Channel 245A. [6] It is also necessary to substitute Channel 276A for Channel 244A at Crandon, Wisconsin. [7] Next, we will substitute Channel 244C3 for Channel 243A at Algoma, Wisconsin, and modify the license for Station WOMA(FM) to specify operation on Channel 244C3. [8] Concurrence by the Canadian government has been obtained with respect to the channel substitutions at Crandon and Algoma because the reference coordinates are located within 320 kilometers (200 miles) of the U.S.-Canadian border. Because objections were filed with respect to the upgrade at DePere, Wisconsin, we will consider that upgrade and related substitutions at Brillion and Mishicot, Wisconsin, below.

DePere, Wisconsin

6. Good Neighbor Broadcasting, Inc. ("GNB"), permittee of Station WHYB, Channel 241A, Peshtigo, Wisconsin, and Mishicot Broadcasting Corporation ("MBC"), applicant for the Channel 298A allotment at Mishicot, Wisconsin, have filed comments in opposition to the proposed Channel 240C3 upgrade at DePere, Wisconsin. In their comments, both MBC and GNB contend that the proposed Channel 240C3 upgrade would be short-spaced to the reference coordinates for the Channel 241A allotment at Peshtigo, Wisconsin, and that the proposed Channel 240C3 allotment would pose a hazard to air navigation. MBC and GNB also argue that allotting Channel 240C3 to DePere would restrict the flexibility of GNB to relocate the transmitter site of Station WHYB.

7. These arguments do not justify the denial of the proposed upgrade at DePere, Wisconsin. Although the proposed channel at DePere is short-spaced to the reference coordinates for Channel 241A at Peshtigo, it is fully spaced to the site specified in the construction permit for Station WHYB, Peshtigo, Wisconsin. In view of the fact that a construction permit has been granted for the channel, we see no overriding public interest benefit in delaying the institution of wide-area FM service to DePere [9] while awaiting grant of a license for Station WHYB. [10]

8. We do not believe that the arguments advanced by MBC and GNB concerning a potential hazard to air navigation warrant further inquiry in this proceeding. As a matter of policy, we generally do not consider issues relating to FAA approval at the allotment stage because no specific site for operation is being approved at that time. *See West Palm Beach, Florida,* 3 FCC Rcd 5810 (1988). Instead, FAA concurrence is required at the application stage when a specific transmitter site is proposed

---

[3]On August 22, 1989, we granted the application of Good Neighbor Broadcasting, Inc. for the Channel 241A allotment at Peshtigo, Wisconsin (File No. BPH-881024MB).

[4]Public Notice of the counterproposals filed by ODON, ACC, and Wheeler was given on September 20, 1989, Report No. 1796.

[5]The reference coordinates for the Channel 244C2 allotment at Whiting, Wisconsin, are 44-38-41 and 89-51-11. This site is 29.7 kilometers (18.5 miles) northwest of Whiting.

[6]The reference coordinates for the Channel 245A allotment at Oshkosh, Wisconsin, are 44-06-36 and 88-30-18. Inasmuch as this modification of license enables us to upgrade Station WYTE, Whiting, Sharon Broadcasting Corporation is required to reimburse ODON for the costs of changing its channel, which Sharon has agreed to do. *See Circleville, Ohio,* 8 FCC 2d 159 (1967).

[7]The reference coordinates for the Channel 276A allotment at Crandon, Wisconsin, are 45-34-18 and 88-53-54.

[8]The reference coordinates for the Channel 244C3 allotment at Algoma, Wisconsin, are 44-38-08 and 87-37-37. This site is 15.5 kilometers (9.6 miles) west of Algoma.

[9]We also note that on January 13, 1990, GNB filed an application to relocate the Station WHYB transmitter site (File No. BMPH-900130IE). That site would be short-spaced to the Channel 240C3 upgrade at DePere. That application is a mere site preference, and, therefore, does not present sufficient public interest benefits to warrant a preference over the benefits of an upgrade at DePere. *See Campbellsville, Kentucky,* 4 FCC Rcd 5770, 5771 (1989). Moreover, we do not believe that an argument pertaining to "flexibility" in selecting future transmitter sites warrants denial of a pending upgrade proposal.

[10]In addition, in view of the fact that GNB has never requested the use of Channel 241A at the reference coordinates and no other party may now file an application for this allotment, we see no reason to continue to protect the coordinates at which the channel was originally allotted. Therefore, we will amend the coordinates to conform to the site specified in GNB's construction permit, 45-05-58 and 87-40-35.

for actual operation. MBC and GNB have not demonstrated any reason to depart from this policy in regard to the upgrade at DePere. Moreover, in regard to the DePere upgrade, we note that there are six transmitters using four existing towers within one mile of the site for the proposed DePere upgrade. Each of these towers is at least 1,160 feet above ground. According to ACC, the proposed tower for the Class C3 operation by Station WJLW will be only 350 feet. Furthermore, these existing stations are operating at an effective radiated power of 100 kilowatts while the maximum power for a Class C3 station is 25 kilowatts. [11]

9. In view of the above, we believe that the public interest would be served by the Channel 240C3 upgrade at Station WJLW, DePere, Wisconsin. [12] To accommodate this upgrade, we are substituting Channel 298A for Channel 242A at Brillion, Wisconsin, and modifying the construction permit of Station WEZR to specify operation on Channel 298A. [13] In order to permit the Channel 298A construction permit modification at Brillion, we are substituting Channel 234A for vacant Channel 298A at Mishicot, Wisconsin. [14]

10. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 1, 1991,** the Table of FM Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below:

Community	Channel No.
Algoma, Wisconsin	244C3
Brillion, Wisconsin	298A
Crandon, Wisconsin	276A
DePere, Wisconsin	240C3
Mishicot, Wisconsin	234A
Oshkosh, Wisconsin	245A, 280A
Whiting, Wisconsin	244C2

11. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, the license of Sharon Broadcasting Corporation for Station WYTE, Whiting, Wisconsin, IS MODIFIED to specify operation on Channel 244C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communication's Act of 1934, as amended, the license of Wheeler Broadcasting, Inc. for Station WOMA, Algoma, Wisconsin, IS MODIFIED to specify operation on Channel 244C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

13. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communication's Act of 1934, as amended, the license of American Communications Company for Station WJLW, DePere, Wisconsin, IS MODIFIED to specify operation on Channel 240C3, subject to the following conditions:

[11]The Joint Supplement to Record also refers to a pleading filed by MBC which does not appear in the official docket for this proceeding but apparently was served on the parties. We have obtained a copy of this pleading and find that it does not warrant denial of the proposed upgrades and channel substitutions. It seeks to raise essentially two new issues. First, MBC claims that applicants for Channel 298A at Mishicot, Wisconsin, should be entitled to reimbursement for expenses in connection with refiling new application forms to specify the substituted channel. However, it is well established Commission policy that applicants are not entitled to reimbursement. *See, e.g., Gleneden Beach, Sweet Home, and Toledo, Oregon*, 4 FCC Rcd 7796 (1989). Indeed, the Hearing Designation Order in MM Docket No. 91-13 specifically provided that the construction permit issued to any of the applicants for Channel 298A at Mishicot will be conditioned upon the outcome of the instant rule making proceeding. Second, MBC would like to retain Channel 298A at Mishicot because it believes that this existing frequency would better qualify it for an upgrade to a C3 channel than the proposed channel. We find this argument speculative in that no supporting documentation was submitted. Furthermore, an applicant for a new station is not eligible to file for an upgrade of a channel. *See, e.g., Arlington, Texas*, FCC 91-105, released April 17, 1991. And, even if MBC had been eligible to file for an upgrade, its suggestion of an upgrade for Mishicot was advanced too late to be considered in this proceeding.

[12]The reference coordinates for the Channel 240C3 allotment at DePere, Wisconsin, are 44-23-22 and 88-01-47. Because this allotment results from a petition for rule making filed prior to October 2, 1989, the licensee at DePere may avail itself of the provisions of Section 73.213(c)(1) of the Rules with respect to Station WHYB, Channel 241A, Peshtigo, Wisconsin, and Station WYUR(FM), Channel 241A, Ripon, Wisconsin.

[13]The reference coordinates for the Channel 298A allotment at Brillion, Wisconsin, are 44-12-23 and 88-05-20.

[14]The reference coordinates for the Channel 234A allotment at Mishicot, Wisconsin, are 44-14-12 and 87-38-24. The two applicants for the Channel 298A allotment at Mishicot will be permitted to amend their applications to specify Channel 234A without loss of cut-off protection.

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

14. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules, the license of ODON Communications Group I Limited Partnership for Station WUSW, Oshkosh, Wisconsin, IS MODIFIED to specify operation on Channel 245A in lieu of Channel 244A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in BLH-6328 except for the channel specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED that transmission facilities comply in all respects with license BLH-6328 except for the channel as specified above and a license application is filed within 10 days of the commencement of program tests.

15. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules, the construction permit of Brillion Radio Company for Station WEZR, Brillion, Wisconsin, IS MODIFIED to specify operation on Channel 298A in lieu of Channel 242A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in BPH-880815MS except for the channel specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED that the transmission facilities comply in all respects with construction permit BPH-880815MS except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

16. IT IS FURTHER ORDERED, That the aforementioned counterproposal filed by ODON Communications Group I Limited Partnership proposing a Channel 241C3 operation at Station WUSW, Oshkosh, Wisconsin, IS DISMISSED.

17. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* to the licensee of Station WUSW, Channel 244A, Oshkosh, Wisconsin, the permittee of Channel 241A at Peshtigo, Wisconsin, the permittee of Channel 242A at Brillion, Wisconsin, and the two applicants for Channel 298A at Mishicot, Wisconsin:

Odon Communications Group I
4 Bridlewood Lane
Northfield, Illinois 60093
(Licensee at Oshkosh)

Brian M. Madden
Cohn and Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(Counsel for Odon Communications)

Brillion Radio Company
Radio Station WEZR(FM)
1296 Marian Lane
Green Bay, WI 54304
(Permittee at Brillion)

Good Neighbor Broadcasting, Inc.
Radio Station WHYB(FM)
413 Tenth Avenue
P. O. Box 375
Menominee, WI 49858
(Permittee at Peshtigo)

Value Radio Corporation
P.O. Box 1490
Oshkosh, Wisconsin 54903
(Applicant at Mishicot)

Mishicot Broadcasting Corporation
P. O. Box 59
Mishicot, WI 54228
(Applicant at Mishicot)

David D. Oxenford
Fisher, Wayland, Cooper, and Leader
1255 - 23rd Street, N.W.
Suite 800
Washington, D.C. 20036
(Counsel for Value Radio)

Denise B. Moline
Broadcast Media Legal Services
9105 Owens Drive
Manassas Park, VA 22111
(Counsel for Mishicot Broadcasting)

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

19. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 1, 1991

Released: May 17, 1991

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Benito B. Rish, M.D.
Licensee, Radio Station WREM
46 Ludlow Street
Yonkers, NY 10705

Dear Dr. Rish:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended.

Section 310(d) of the Communications Act states, in pertinent part:

> No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

The Commission has adopted regulations for the enforcement of this statute, including requirements that a licensee file with the Commission, within 30 days of their execution, "contracts, instruments or documents relating to the present or future ownership or control of the licensee," including options, *see* 47 C.F.R. § 3613(b); and "contracts relating to the utilization in a management capacity of any person other than an officer, director, or regular employee of the licensee," as well as "station management contracts with any persons, whether or not officers, directors, or regular employees, which provide for both a percentage of profits and a sharing of losses; or any similar agreements," *see* 47 C.F.R. § 3613(c).

During an inspection of the WREM(AM) facility on April 3, 1989, the FCC's Field Operations Bureau discovered that an entity called ARK Communications, Inc., was operating the station pursuant to a lease. Neither the lease nor any other contract with ARK had been filed with the Commission. In response to a request (by inquiry dated September 8, 1989) for a description of your relationship to and transactions with ARK Communications and its principals, you stated: "The only agreements that I have are with ARK Communications and they are only leases where I am the landlord and ARK Communications is the tenant." Asked about your participation in the hiring and recruiting of station personnel and your contacts with them, you replied that ARK hired the station manager and that you had "nothing to do with the hiring or recruiting of him." Further, you stated that you are seldom in contact with any WREM personnel, communicating with ARK's president "as any landlord does simply for payments of rent, etc." Asked about WREM's bank accounts, you replied, "No separate bank accounts; since the only money received is one check a month as landlord, I deposit [it] in my personal bank account."

The lease agreements you submitted with your answer of September 29, 1989, provide that ARK, in exchange for a fixed fee (initially, in November 1987, for assuming WREM's debts not to exceed $3,000; amended in June 1989 to provide for $1,000 per month rental payments), participates directly in the station's profits, and is responsible for payment of the station's bills, including insurance and utilities. You are responsible under the lease for paying real estate taxes and have agreed not to "unduly interfere with the TENANT's business" on the leased premises, so that "TENANT shall peaceably and quietly hold and enjoy the Leased Premises . . . without hindrance or interruption by LANDLORD." Moreover, the lease provides that ARK "shall have the first option to purchase license, facilities and/or property."

On April 27, 1990, your were advised in writing of the Mass Media Bureau's concerns that your agreements with ARK Communications, Inc., might violate Section 310(d) of the Communications Act and related rules and policies. You were invited to address this issue in a written statement more fully discussing the specifics of your control and ARK's control over the operations of WREM. In your response dated May 22, 1990, you stated, "I felt that a religious format [as provided by ARK] would work and be a great new service to Aroostook County. . . . It is axiomatic that when ARK operated the station, the permit or license was not transferred, only the right to limited use under my complete control. I always have had access and control of the station. . . . [I]f the FCC desires me to do anything with them [ARK], I am free and in complete control and I can make them do anything, including ending our relationship on 30 days notice." You argued that you "retain complete control of this station" under the lease provisions: "In this sense I control their [ARK's] entire existence; their hiring and firing and programming." You also stated, "The income I receive goes to station operation. There is no profit."

As explained to you in the April 27, 1990, letter, while there is no exact formula by which "control" can be determined, the courts and the Commission have established certain guidelines. In addition to legal title, licensee conduct with respect to station programming, personnel, and finances can demonstrate that control has been relinquished to another, unauthorized, person or entity, in violation of Section 310(d) of the Communications Act. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981).

From the information available to the Commission, it appears that ARK controls WREM's advertising accounts, format, commercial policy, and hiring and firing; that it receives compensation from the station's profits and pays you a fixed rental fee; that it is responsible for payment of the station's bills; and that, under the terms of the lease agreement and by your own choice in the manner you have distanced yourself from station operations, your "access" to the station has been limited. These circumstances indicate a virtual abandonment of control to ARK Communications, which entity appears to control all important aspects of station operations. Your ability, as

landlord, to end ARK's tenancy of the "leased premises," is, without more, insufficient to show that you have not abandoned control of the station to ARK. A licensee must be more than simply a landlord. Many licensees do not own the real property from which they broadcast, and the Commission does not by virtue of that circumstance attribute "control" of the license to the actual property owner.

On the other hand, where control of a station's hiring and firing policies and programming resides in persons or entities other than the licensee, *see Tri-Counties Communications, Inc.*, 31 FCC 2d 83 (1971), or where management is compensated from a station's profits rather than by fixed salary and is personally responsible for payment of a station's bills, *see WWIZ, Inc.*, 36 FCC 561, 582-83 (1964),[1] the Commission has held that control has been improperly transferred. The licensee may delegate responsibility for various aspects of station authority and day-to-day operation, but the licensee must retain effective control of the station's management and operation. By your own admission, you have no involvement in or oversight of station matters; the mere selection of a lessee and general format does not rise to the level of control required by the Commission.

Thus, it appears that from November 22, 1987, to and including the present, you have violated Section 310(d) of the Communications Act of 1934, as amended. It also appears that you have failed to comply with Section 73.3613 of the Commission's rules, since you did not timely inform the Commission of your option and management agreements with ARK.

Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of ten thousand dollars ($10,000) for the foregoing willful violations. The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on May 1, 1991.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] *See* also *Notice of Apparent Liability to Charles R. Crisler* (MMB, Jan. 25, 1988) (re KRIM(FM), formerly KAFM(FM)), *review denied, High Country Broadcasting Corp.*, 4 FCC Rcd 1528 [65 RR 2d 1618] (1989).

Before the
Federal Communications Commission
Washington DC 20554

CC Docket No. 83-1376

In the Matter of

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands	RM-4436

ORDER

Adopted: May 8, 1991; Released: May 17, 1991

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), we hereby appoint the Honorable Dean J. (Joe) Miller to be a member of the Federal-State Joint Board in CC Docket No. 83-1376. This appointment fills the position recently vacated by the Honorable Nels J. Smith. Henceforth a copy of all filings in this proceeding shall be served on Mr. Miller at the following address:

The Honorable Dean J. (Joe) Miller
President
Idaho Public Utilities Commission
Statehouse
Boise, Idaho 83720

2. Accordingly, IT IS ORDERED, that the Honorable Dean J. (Joe) Miller, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), shall serve as a member of the Federal-State Joint Board in CC Docket No. 83-1376.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington DC 20554

PUBLIC NOTICE

Released: May 9, 1991

FCC ANNOUNCES MEETING OF THE ONA JOINT CONFERENCE

The Federal/State Joint Conference on Open Network Architecture (ONA) will meet at 9:00 a.m. on Thursday, May 16, 1991, at the Federal Communications Commission, Room 856, 1919 M Street, N.W., Washington, D.C. The meeting will be open to the public. The Joint Conference will address issues concerning implementation of ONA at the state and federal levels including safeguards for carrier provision of enhanced services, federal-state jurisdiction, tariff uniformity, and regulation of enhanced services.

The Joint Conference serves as an ongoing forum for state/federal cooperation to facilitate the development and implementation of ONA. The Joint Conference was initially announced in the Federal Communication Commission's *BOC ONA Order* (4 FCC Rcd 1 (1989)).

For further information contact Patrick Donovan, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 18, 1991

COMMON CARRIER BUREAU REVISES PLEADING SCHEDULE FOR 1991 ANNUAL ACCESS TARIFF FILNGS

On April 2, 1991, local exchange carriers (LECs) filed annual access tariffs that are scheduled to become effective July 1, 1991. Pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, petitions against the LECs' access tariffs are due April 29, 1991.

On April 9, 1991, the Commission adopted a Reconsideration Order in CC Docket 87-313, the proceeding which adopted price cap regulation for LECs. *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, FCC 91-115, adopted April 9, 1991. That Order modified the Commission's LEC price cap rules in some respects. These modifications must be reflected in the rates that will become effective July 1. In addition, as in past years, the Commission will entertain applications for special permission seeking waiver of the Commission's Rules to allow tariff-filing entities to make erratum filings to correct errors in their original annual access filings.

In order to allow carriers sufficient time to revise their access tariffs to reflect these modifications (and to allow interested parties to comment on the revised filings) the schedule for filings and pleadings concerning the annual access tariff filings is revised as follows:

April 24, 1991 -- applications for special permission to make erratum filings must be filed. These applications should be limited to revisions other than those required by the Commission's *LEC Price Cap Reconsideration Order*.

May 2, 1991 -- carriers subject to price cap regulation must file revised access tariffs reflecting the modifications contained in the Commission's *LEC Price Cap Reconsideration Order*. These carriers shall also file revised Tariff Review Plan (TRP) charts. Due to action taken in the *LEC Price Cap Reconsideration Order*, the format of TRP Chart EXG-1 requires slight modification. This chart, which carriers must file, is attached to this public notice. In addition, carriers that have been granted special permission to make erratum filings must file revisions correcting any deficiencies on this date. All tariff revisions must be filed under one transmittal.

May 14, 1991 -- petitions addressing all tariffs, including revisions filed on May 2, must be filed.

May 23, 1991 -- Replies by LECs to petitions against access tariff filings must be filed. In addition, any interested party may file comments restricted to an evaluation of data filed by the LECs in the Commission's Automated Reporting Management Information System (ARMIS) on May 15 in comparison to a LEC's access filing. Any such comments must be served by hand on the carrier or carriers whose ARMIS data they discuss.

May 28, 1991 -- LECs may file replies to any comments concerning their May 15 ARMIS filings.

No further pleadings will be entertained nor will extensions of any of these deadlines be granted.

For further information contact Judy Nitsche (202) 632-5550 or Kelly Cameron, (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

FILING ENTITY:

COMMON LINE
EXOGENOUS COST CHANGES
($000)

		SPF TRANSITION (A)	DEM TRANSITION (B)	LTS/TRS (C)	INSIDE WIRE (D)	RESERVE DEFICIENCY AMORTIZATIONS (E)	EXCESS DEFERRED TAXES (F)	OTHER (G)	TOTAL (H)
	REVENUE EFFECT								
100	Depreciation Expense			N/A					N/A
110	Expense Less Depreciation			N/A					N/A
120	Taxes Less F.I.T.			N/A					N/A
130	Net Return			N/A					N/A
140	F.I.T.			N/A					N/A
150	Uncollectible Rev. & Other Adjustments			N/A					N/A
160	Revenue Effect								
	RATE BASE								
170	Total Plant In Service			N/A					N/A
180	Other Rate Base Items			N/A					N/A
190	Depreciation Reserve			N/A					N/A
200	Accum. Deferred Inc. Tax			N/A					N/A
210	Net Rate Base			N/A					N/A

NOTE: Total may not equal sum of changes due to interactive effects.

FILING ENTITY:

TRAFFIC SENSITIVE
EXOGENOUS COST CHANGES
($000)

		SPF TRANSITION (A)	DEM TRANSITION (B)	LTS/TRS (C)	INSIDE WIRE (D)	RESERVE DEFICIENCY AMORTIZATIONS (E)	EXCESS DEFERRED TAXES (F)	OTHER (G)	TOTAL (H)
	REVENUE EFFECT								
300	Depreciation Expense			N/A					N/A
310	Expense Less Depreciation			N/A					N/A
320	Taxes Less F.I.T.			N/A					N/A
330	Net Return			N/A					N/A
340	F.I.T.			N/A					N/A
350	Uncollectible Rev. & Other Adjustments			N/A					N/A
360	Revenue Effect								
	RATE BASE								
370	Total Plant In Service			N/A					N/A
380	Other Rate Base Items			N/A					N/A
390	Depreciation Reserve			N/A					N/A
400	Accum. Deferred Inc. Tax			N/A					N/A
410	Net Rate Base			N/A					N/A

NOTE: Total may not equal sum of changes due to interactive effects.

FILING ENTITY:

SPECIAL ACCESS
EXOGENOUS COST CHANGES
($000)

		SPF TRANSITION (A)	DEM TRANSITION (B)	LTS/TRS (C)	INSIDE WIRE (D)	RESERVE DEFICIENCY AMORTIZATIONS (E)	EXCESS DEFERRED TAXES (F)	OTHER (G)	TOTAL (H)
	REVENUE EFFECT								
500	Depreciation Expense			N/A					N/A
510	Expense Less Depreciation			N/A					N/A
520	Taxes Less F.I.T.			N/A					N/A
530	Net Return			N/A					N/A
540	F.I.T.			N/A					N/A
550	Uncollectible Rev. & Other Adjustments			N/A					N/A
560	Revenue Effect								
	RATE BASE								
570	Total Plant In Service			N/A					N/A
580	Other Rate Base Items			N/A					N/A
590	Depreciation Reserve			N/A					N/A
600	Accum. Deferred Inc. Tax			N/A					N/A
610	Net Rate Base			N/A					N/A

NOTE: Total may not equal sum of changes due to interactive effects.

FILING ENTITY:

INTEREXCHANGE
EXOGENOUS COST CHANGES
($000)

		SPF TRANSITION (A)	DEM TRANSITION (B)	LTS/TRS (C)	INSIDE WIRE (D)	RESERVE DEFICIENCY AMORTIZATIONS (E)	EXCESS DEFERRED TAXES (F)	OTHER (G)	TOTAL (H)
	REVENUE EFFECT								
700	Depreciation Expense			N/A					N/A
710	Expense Less Depreciation			N/A					N/A
720	Taxes Less F.I.T.			N/A					N/A
730	Net Return			N/A					N/A
740	F.I.T.			N/A					N/A
750	Uncollectible Rev. & Other Adjustments			N/A					N/A
760	Revenue Effect			N/A					
	RATE BASE								
770	Total Plant In Service			N/A					N/A
780	Other Rate Base Items			N/A					N/A
790	Depreciation Reserve			N/A					N/A
800	Accum. Deferred Inc. Tax			N/A					N/A
810	Net Rate Base			N/A					N/A

NOTE: Total may not equal sum of changes due to interactive effects.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91-115

In the Matter of	)	
	)	
Policy and Rules Concerning Rates for Dominant Carriers	)	CC Docket No. 87-313

ORDER ON RECONSIDERATION

Adopted: April 9, 1991 ; Released: April 17, 1991

By the Commission: Commissioner Duggan concurring in part and dissenting in part and releasing a statement.

Table of Contents

		Paragraph
I.	Introduction	1
II.	Development of the Price Cap Index	
	A. The Price Cap Index	20
	B. The Productivity Offset	
	1. Minimum 3.3 Percent Offset	22
	2. Optional 4.3 Percent Offset	33
	3. The Common Line Formula	37
	C. Exogenous Costs	59
	1. Other Post-Employment Benefit Costs	60
	2. Equal Access Costs	65
	3. Tax Law Changes	69
	4. Depreciation Rate Changes	74
	5. Allocation of Exogenous Costs	77
	6. Amortization	79
	7. Other Exogenous Cost Issues	83
	D. Sharing and Adjustment Mechanisms	86
	1. Total Interstate Earnings as Basis of Sharing	89
	2. Interexchange Services and the Sharing Mechanism	95
	3. Excluded Services and Sharing	98
	4. Interest	100
	5. Calculation Issues	106
	6. The Lower Adjustment Mark	116
	7. Refunds from Rate of Return Regulation	119
	8. January - June 1991 Earnings	121

III. Price Cap Tariff Filings

A. New Services 122
B. Within-band, Below-cap, Filings 133
C. Below-band Filings 136

IV. Elective Participation in Price Cap Regulation

A. Small and Mid-sized LEC Productivity 138
B. Mergers and Acquisitions 146
C. Initializing Indices for Elective LECs 150

V. Application of the PCI to LEC Services

A. Existing Rates 152
B. Baskets and Bands 155
1. Subindices for DS1 and DS3 Services 155
2. Common Line Basket 160
3. Other Issues 166
C. Service Exclusions 170

VI. Reporting and Monitoring

A. Service Quality and Infrastructure Reporting 173
1. Service Quality Reporting 173
2. Infrastructure Development 191
B. Monitoring and Performance Review 192

VII. Complaints 200

VIII. Ordering Clauses 207

Appendix A List of Parties
Appendix B Amendments to the Code of Federal Regulations

I. INTRODUCTION

1. On September 19, 1990, this Commission concluded a comprehensive examination of incentive regulation for local exchange carriers by adopting a new system of regulating the interstate common carrier services of the largest of these carriers.[1] The new regulatory system, known as price cap regulation,

---

1 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order). See also Policy and Rules Concerning Rates for Dominant Carriers, CC Docket

is designed to increase local exchange carrier productivity by harnessing profit-making incentives common to all businesses; to establish rate ceilings that require carriers to decrease rates after inflation; and to encourage carriers to provide innovative, high quality services. In this Order on Reconsideration, we generally affirm the price cap regulatory structure we previously adopted. In response to petitions for reconsideration of our decision, however, we make several modifications to our regulatory requirements, and we clarify several portions of the LEC Price Cap Order.[2]

2. This Order: (1) clarifies the sharing and adjustment mechanism as to the imposition of interest and the use of total interstate data; (2) clarifies that the expiration of inside wire amortizations will be treated as an exogenous cost change; (3) requires that the expiration of inside wire amortizations and reserve deficiency amortizations be included in the annual price cap filings; (4) permits exogenous treatment of paybacks of excess deferred taxes; (5) permits the use of historical, instead of forecast, demand in the calculation of the national average carrier common line charge; (6) amends the tariff requirements for new service filings; and (7) clarifies our service quality reporting requirements. We note that these alterations to our price cap rules will become effective in time to permit price cap LECs to amend their first annual price cap tariffs, currently pending before us, to reflect the changes made in this Order on Reconsideration prior to the July 1, 1991 effective date of the tariff filings.[3]

No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987); Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 3 FCC Rcd 3195 (1988); Report and Order and Second Further Notice of Proposed Rulemaking, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (adopting price cap regulation for AT&T and requesting comment on a revised plan for local exchange carriers); Supplemental Notice of Proposed Rulemaking, CC Docket No. 87-313, 5 FCC Rcd 2176 (1990). The price cap regulations governing AT&T were slightly modified in the reconsideration of the AT&T Price Cap Order. Memorandum Opinion and Order on Reconsideration, CC Docket No. 87-313, 6 FCC Rcd 665 (1991) (AT&T Price Cap Reconsideration Order). The Report and Order adopting price cap regulation for AT&T, and the Second Further Notice proposing price cap regulation of LECs, were published as one document. When referring to the portion of the document containing the final order for AT&T price cap regulation, we will cite: AT&T Price Cap Order, 4 FCC Rcd 2873 (1989). When referring to the portions of the document addressing LEC price caps, we will cite: Second Further Notice, 4 FCC Rcd 2873 (1989).

2 Appendix A lists the parties participating, as well as the abbreviations we use throughout this Order to refer to those parties.

3 Pursuant to delegated authority, the Chief, Common Carrier Bureau, will direct the LECs when to file revisions to their tariff submissions and will establish a pleading cycle with regard to those revisions.

3. Price cap regulation of LECs is designed to produce greater benefits for both ratepayers and carriers than they would have received under the prior system of regulation. Unlike the previous, cost-plus system of regulation that capped profits, price cap regulation encourages LECs to earn reasonably higher profits than were formerly allowed. But in a regulatory system that caps prices, higher profits must be generated through productivity gains. LECs must become more efficient, and offer innovative, high quality services, in order to succeed under a price cap regime. If a LEC fails to keep pace with the productivity requirement embedded in the cap, it risks seeing its earnings erode. Ratepayers benefit from the innovation that price cap regulation is intended to spur and from a series of protections built into the design of the price cap system itself. Foremost among these protections are the requirements that rates decrease on an inflation-adjusted basis and that LECs share higher achieved earnings with ratepayers.

4. The architecture of the price cap system for LECs begins with the design of the rate cap. As adopted, the cap is composed of a limited number of elements that together provide a benchmark of how price cap LECs' costs will change over time. For special access, traffic sensitive access, and interexchange offerings, the cap is composed of three elements. The first element, inflation, is measured by the Gross National Product Price Index (GNP-PI). Second, a productivity offset, selected on the basis of the amount by which LEC productivity growth has historically exceeded the economy generally, is subtracted from the inflation element. Third, specified exogenous cost changes that generally are outside the carriers' control, and often result from regulatory changes, are added to the formula. The cap is calculated once a year, for LEC tariffs effective July 1.

5. The formula used to cap non-traffic sensitive access rates, or common line charges, is slightly different. This difference stems from the unique characteristics of the carrier common line charge, which recovers a portion of non-traffic sensitive costs on a traffic sensitive, per minute basis. As adopted, the common line cap formula includes an adjustment that rewards LECs for half the growth in common line minutes. This formula recognizes the fact that LECs have some ability to influence interstate usage of local common lines, but that usage is also affected by other factors, including efforts and prices of long distance carriers. Due to the formula's characteristics, we refer to our common line formula as the "Balanced 50/50" plan to distinguish it from the numerous other cap proposals that were considered for common line. We also recognize that the Balanced 50/50 formula, while rewarding LECs for increasing demand, creates a more difficult challenge for LECs to meet than the common line formula previously proposed in this docket.

---

6. In addition to adopting a common line formula that is more challenging to LECs, the LEC Price Cap Order made important revisions to the productivity offset of 3 percent previously considered. Based on a staff study of LEC productivity since divestiture, as well as on a staff study of long term productivity, the price cap rules mandate a productivity offset of 3.3 percent, and include in the cap mechanism a means of inducing LECs to pursue even higher productivity gains if possible. Price cap LECs may elect to set their price caps by using a 4.3 percent productivity offset. Election of the higher productivity offset lowers the price cap, thereby benefiting ratepayers. However, election of the higher offset also permits the LEC to retain a larger share of its earnings, thereby benefiting the LEC if it can increase its productivity.

7. To ensure that the productivity offsets we selected for our LEC price cap system benefit ratepayers of each and every LEC regulated under price caps, we have imposed an incentive-based method of ensuring that ratepayers share in the benefits a price cap system can produce. If a LEC selects the 3.3 percent productivity offset and outperforms it, the LEC will be entitled to retain all of its earnings up to 100 basis points (or 1 percent) above the unitary rate of return established for rate of return carriers. A carrier using the 3.3 percent productivity offset to establish prices must share with its customers 50 percent of its earnings between 100 and 500 basis points (1 to 5 percent) above the unitary rate of return, and 100 percent of earnings in excess of 500 basis points above the unitary rate of return. Based on the 11.25 percent unitary rate of return currently in effect, this mechanism allows a carrier that dramatically exceeds the productivity requirements of the price cap formula to reach an effective equivalent of up to 14.25 percent rate of return.[4]

8. If a carrier elects a more challenging productivity offset of 4.3 percent, the carrier lowers its rates an additional 1 percent, and can retain more of its earnings, if it is able to earn higher profits. In this case, the carrier can retain all of its earnings up to 200 basis points (or 2 percent) above the unitary rate of return established for rate of return carriers. This carrier would share with its customers 50 percent of its earnings between 200 and 600 basis points (2 to 6 percent) above the unitary rate of return, and 100 percent of its earnings in excess of 600 basis points above the unitary rate of return. In electing to lower prices to a level reflecting a higher 4.3 percent productivity offset, the carrier's effective maximum rate of return would be 15.25 percent. Thus, under the sharing mechanism, carriers that are able to produce significantly greater than

---

4 Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 7507 (1990) (Represcription Order).

anticipated gains in productivity, as evidenced by earnings well above those expected in a rate of return environment, are required to share the benefits of their performance with ratepayers in the form of rate decreases.

9. In addition to guarding against the possibility that the productivity offsets selected may be too low for a given company in a particular year, the price cap regulations guard against the possibility that the formula will force rates to a level that results in unusually low earnings. The plan includes a lower end adjustment mechanism to ensure that the plan automatically corrects itself should the established productivity factor for the industry prove to be too demanding for a given company. The lower adjustment mechanism is 100 basis points (1 percent) below the unitary rate of return. If a carrier's earnings drop below this level for one year, that carrier will be entitled to an automatic prospective upward adjustment to its cap in the following year.

10. Moreover, we take a cautious approach in applying our price cap regulations to the LEC industry. Price cap regulation is mandatory only for the seven Regional Bell Operating Companies (RBOCs) and GTE Telephone Operating Companies (GTOC). Other LECs may elect price cap regulation at their option, as long as they are not participants in the National Exchange Carrier Association cost and revenue pools. Companies and their affiliates are required to enter price caps, or volunteer for price caps, on an "all-or-nothing" basis. The all-or-nothing rule is intended to prevent cost shifting from affiliates subject to price caps to affiliates regulated under rate of return. Average schedule affiliates, which do not have the same incentives to shift costs, are exempted from the all-or-nothing rule. We permit an annual opportunity for election of price cap regulation, but once regulated pursuant to price caps, LECs cannot elect to return to rate of return regulation.

11. Rather than establish one price cap for all of a LEC's interstate services, we divide interstate offerings into four groups, or baskets, each subject to its own cap. The groupings we use are borrowed from the interstate access structure contained in our Part 69 rules. If a LEC elects the higher 4.3 percent productivity factor, it must do so for all four of its baskets. As discussed above, the common line basket is capped using the Balanced 50/50 method. The traffic sensitive basket and the special access basket use the index method. Interexchange services are capped based on the productivity offset we use to cap AT&T services, 3 percent, although a LEC electing a 4.3 percent offset (1 percent above the minimum productivity requirement) for its access baskets will, however, be required to use a 4 percent offset (1 percent above the 3 percent offset used for AT&T) for its interexchange basket.

12. Division of LEC services into four baskets, each subject to a separate cap, sharply limits LEC pricing flexibility and incentives to shift costs. To further protect ratepayers from substantial price changes, our price cap rules identify service categories within the baskets, and limit the annual price movements in these categories to plus or minus 5 percent

per year, adjusted for changes in the cap. The traffic sensitive basket is subdivided into three service categories: local switching, local transport, and information. The special access basket contains four categories: (1) voice grade, WATS, metallic, and telegraph; (2) audio and video; (3) high capacity and Digital Data Service; and (4) wideband data and wideband analog. Our price cap rules also create separate subindices for two offerings within the high capacity and Digital Data Service category, one for DS1 and one for DS3 services. These separate subindices limit price movements of DS1 and DS3 services to plus or minus 5 percent per year, adjusted for changes in the price cap.

13. Together, the price cap limits and pricing bands used in the traffic sensitive and special access baskets form a "no-suspension zone" within which LECs may easily change prices. Rate changes that conform to these limits are presumed lawful and permitted to take effect under streamlined review, on 14 days' notice. Should a LEC decide to file rates outside the no-suspension zone, the price cap rules require more rigorous scrutiny. More extensive documentation is required, the presumption of lawfulness disappears, and longer notice periods apply. Above-cap and above-band filings carry a heavy burden of justification and a strong likelihood of suspension.

14. Special rules apply to new, restructured, and excluded services. New services, defined as those that expand a ratepayer's range of choices, are filed on 45 days' notice and must be accompanied by a showing demonstrating that the new service will increase net revenues for the LEC over a specified period of time. Once new services have been in effect for a period of time that allows the observation of demand, these services are included in the relevant price cap basket and service category. New offerings that represent fundamental changes to our Part 69 access structure, such as the implementation of Open Network Architecture, may be subject to additional requirements established in other Commission proceedings. Restructured services, those that simply redefine existing offerings, are also subject to 45-day notice requirements, and are not presumed lawful. A few services, such as one-time and contract services and pre-subscription change charges, are excluded from price caps. These services are subject to traditional tariff review procedures. Applying standard statistical conventions, all indices were initialized at a level of 100, beginning six months before the implementation of price cap regulation on January 1, 1991. Therefore, July 1, 1990 rates are used as the starting point for price cap indices, adjusted downward to implement the 11.25 percent industry rate of return adopted by this Commission on the same day as the LEC price cap rules.

15. Price cap regulation is carefully designed to permit the continued operation of programs that provide assistance to small and high cost telephone companies and their subscribers. The price cap plan makes no changes to programs such as Link Up America, Lifeline Assistance, the Universal Service Fund, Long Term Support, and Transitional Support, that assist small carriers and their customers. Moreover, the LEC Price Cap Order pledges to begin further proceedings on issues of concern for small and mid-sized LECs.

[B

16. To ensure our continued ability to evaluate the price cap system, as well as to evaluate whether the incentives created in the plan operate in the public interest, existing monitoring of LECs' operations is retained. The Commission will also undertake a comprehensive performance review of the system after the end of the third year. The review, to be completed during the fourth year of the plan, will evaluate all aspects of local exchange carrier performance, and make any adjustments to the plan that are warranted.

17. We expect that incentive regulation will encourage LECs to maintain and enhance service quality and innovation. Nonetheless, the Order adopted additional service quality monitoring to respond to commenters' concerns and to provide data for the performance review to be undertaken at the end of three years. Semi-annual reporting continues to be required of the BOCs, and has been extended to GTOC. In addition, all LECs regulated under price caps are required to submit quarterly reports on post-dial delay, network blockage, complaints, trouble reports, installation intervals, repair intervals, and switch downtime. The LEC Price Cap Order directs the Common Carrier Bureau to devise a reporting system and to include it in the Bureau's automated reporting system, ARMIS.

18. In addition to monitoring service quality parameters as revealed through network performance, price cap regulation includes a requirement that the LECs for whom price cap regulation is mandatory report on their investment in the telecommunications infrastructure. The new annual reporting requirement, which is based on reporting received from the RBOCs and GTOC in the rate of return proceeding, will monitor LEC network development as shown in LEC equipment and facilities.

19. In the sections of this Order that follow, we discuss arguments seeking to amend the price cap system described above, and we respond to requests for clarification of certain aspects of the plan and its interaction with other Commission rules. Although generally we decide to leave LEC price cap regulations unchanged, we have modified our plan in several respects in response to petitioners' concerns. The modifications and clarifications adopted in this Order are presented and discussed in detail in the following sections.

II. DEVELOPMENT OF THE PRICE CAP INDEX

A. The Price Cap Index

20. In the LEC Price Cap Order, the Commission explained that the Price Cap Index (PCI) is designed to limit the prices carriers charge for service. LEC Price Cap Order, 5 FCC Rcd at 6792, para. 47. The PCI operates to provide a benchmark of LECs' cost changes that challenges them to become more productive and innovative in exchange for being permitted to retain reasonably higher earnings. The PCI basically contains three components. The first is a measure of inflation, the Gross National Product Price Index (GNP-PI). The

second, a productivity offset, represents the amount by which carrier productivity has historically exceeded productivity in the economy generally. The third allows the value of the PCI to move up or down in response to specific exogenous cost changes. Exogenous cost changes are generally outside the carrier's managerial control and are often the product of this Commission's own regulatory actions.

21. The PCI is the first test of whether a carrier's tariff filings qualify for streamlined review. LEC Price Cap Order, 5 FCC Rcd at 6792, para. 49. In order to qualify for streamlined tariff review under price cap regulation, a carrier's actual prices, as measured through the use of an Actual Price Index (API), must not exceed its PCI. See LEC Price Cap Order, 5 FCC Rcd at 6814, para. 227. The API represents the weighted sum of the percentage change in LEC prices and is built up from the smallest price unit -- the rate element -- weighted according to the quantity of that rate element sold in a historical base year. Each time a carrier files rate revisions, the API is employed to measure the incremental change in the aggregate price of each basket of LEC services. If the API exceeds the PCI, the carrier's rates have gone beyond its cap, and streamlined review is no longer permitted.

B. The LEC Productivity Offset

1. Minimum 3.3 Percent Offset

22. In the LEC Price Cap Order, the Commission mandated a price cap index that includes a 3.3 percent productivity offset each year, or, if a LEC chooses, a 4.3 percent productivity offset. See LEC Price Cap Order, 5 FCC Rcd at 6799, paras. 100-101. This factor was based largely upon two staff studies investigating the extent to which LECs have historically exceeded the economy as a whole in achieving improved productivity. A short term study examined productivity trends in interstate access from 1984 through 1990. A long term study covered interstate charges generally for the years 1930 through 1989. In the Second Further Notice the Commission had proposed a single productivity offset of 3 percent. The 3.3 percent productivity offset adopted in the LEC Price Cap Order creates a more difficult productivity hurdle for LECs. When combined with changes to the common line formula, discussed infra, the plan we adopted substantially raises the price cap productivity hurdle originally proposed, and thereby increases by 40 percent the downward pressure on rates. LEC Price Cap Order, 5 FCC Rcd at 6799, para. 100.

23. The productivity offset is the most important and controversial part of the price cap plan. In their reconsideration petitions, the LECs in general strongly support the plan, including the productivity offset, although

they described it as "ambitious"[5] and "difficult."[6] AT&T characterizes the overall plan as adopted as "a substantial improvement," most significantly because of the higher productivity offset and revised formula, even though it still believes the offset is understated.[7]

24. Our analysis of LEC productivity has, however, drawn criticism from other petitioners. Ad Hoc contends that, with respect to the short term study of productivity, the LEC access price figure for 1984 has been repeatedly demonstrated to be unreliable by Ad Hoc and AT&T experts.[8] Ad Hoc states that the data point is seriously flawed, and thus cannot be taken as fitting the general proposition that inclusion of an additional data point in a study of limited time frame increases the statistical reliability of the analysis.[9] Ad Hoc also contends that Commission attempts to correct errors in the 1984 data point are limited at best.[10] Ad Hoc states further that including the

---

5 NYNEX Petition at 2.

6 USTA Petition at 2.

7 AT&T Petition at 1, 2, n. **.

8 Ad Hoc notes that even the carriers acknowledged serious deficiencies in the 1984 data. Ad Hoc Petition at 6, citing National Exchange Carrier Association, Inc., Revisions to FCC Tariff No. 1, Trans. No. 23, Mimeo No. 1990 (Jan. 17, 1985). But see Ameritech Opposition at 2; BellSouth Opposition at 4 (arguing that the deficiencies referred to were concerned with projected cost and demand data for 1984, not the actual, historical data used in the staff productivity study).

9 Ad Hoc Reply at 5. Specifically, Ad Hoc argues, the 1984 data point is statistically inconsistent with other data points, and contaminates any statistical analysis of historical carrier productivity in which it is included. Ad Hoc Petition at 7; Ad Hoc Reply at 4; see also ICA Reply at 2-6; API Opposition at 6.

10 Ad Hoc Petition at 9-10. Ad Hoc maintains that only one significant adjustment was made, which, in monetary terms, accounted for less than 20 percent of the adjustments recommended by AT&T. Ad Hoc says that the Commission offered only two bases for not implementing further corrective action: (i) USTA assurances that the 1984 data were correct; and (ii) a lack of sufficient information upon which to quantify and make further adjustments. Ad Hoc says that the lack of information or inability to quantify adjustments actually confirms the unreliability of the base data. Accord ICA Petition at 2-6. We note that AT&T does not seek reconsideration of this determination.

1984 data point is not harmless error, since inclusion of this data depressed the LEC productivity offset and narrowed the gap between long and short term studies.[11]

25. ICA argues that while the Commission adopted significant changes in productivity staff studies that were used to construct overall revisions in the PCI and LEC productivity offsets, the Commission's discussion is incomplete and deficient.[12] For example, ICA states that the 3.3 percent and 4.3 percent factors that the Commission selected are not derivations from the range of values produced by either the short or long term studies, and cannot be directly determined from the LEC Price Cap Order.[13]

---

11 Ad Hoc Petition at 11-12.

12 ICA claims the Commission failed to make an independent analysis of the 1984 data, but only "adopted" corrections conceded by the local exchange carriers. ICA Petition at 2-7.

13 ICA Petition at 2-3. In addition, ICA argues that many of the adjustments to the staff studies were developed through ex parte submission by various parties, and are relied on by the Commission, but not cited in its discussion of such adjustments. BellSouth opposes ICA's ex parte argument, and asserts that ICA cites no legal support for this position and does not contend that any party to this proceeding violated the Commission's ex parte rules. BellSouth explains that this proceeding was designated as a nonrestricted rulemaking, and as such, the rules allow a "permit but disclose" approach to ex parte communications. ICA's complaint, says BellSouth, is nothing more than an untimely collateral attack on the Commission's ex parte rules. BellSouth Opposition at 6. See also Ameritech Opposition at 6 (arguing that this reconsideration proceeding cures any procedural problems ICA identifies); see also USTA Opposition at 7. Our consideration of information presented ex parte complies fully with the relevant rules. All such information was elicited in accordance with Sections 1.1204(b)(7) and 1.1206 of the Rules, 47 C.F.R. §§ 1.1204(b)(7), 1.1206. All ex parte presentations were properly noted and made a part of the record of this proceeding. All parties to the proceeding had, and have, the opportunity to review the record, and to respond to ex parte submissions in their comments or in ex parte submissions of their own. Information gained through ex parte submissions is referenced and incorporated in the Commission's discussion in the LEC Price Cap Order. The reconsideration phase of this proceeding provides further opportunity for parties to review and comment upon ex parte submissions.

26. Hawaii also asserts that the Commission should reconsider the specification of productivity factors. Throughout its participation in the price cap proceeding, Hawaii says, it has maintained that all of the studies that have been relied upon by the Commission fail to account for future technological trends that will impact both costs incurred by the companies and demand for services.[14] In Hawaii's view, neither cost nor demand trends in the telecommunications industry reflect general trends in the economy. Hawaii speculates that the Commission assumes that increased productivity will be a result solely of more efficient operations; but Hawaii asserts that productivity in telecommunications will increase, despite the continuing lack of efficiency in the industry, simply because the technological costs will decline. Similarly, ICA argues that the evidence continues to accumulate that the Commission's productivity factor is too conservative to reflect even current productivity trends in the LEC industry, much less future growth in the industry's net productivity gains over the aggregate economy.[15] Hawaii maintains that even if the Commission were correct in assessing the productivity factor on the basis of historical data, the factors adopted in the LEC Price Cap Order cannot be defended on the basis of the studies that have, to date, been conducted.[16] Similarly, Ad Hoc argues that the Commission's long term study results should be disregarded because divestiture and the revolutionary technological developments of the recent past render historical productivity data of little or no predictive value in the 1990's.[17]

27. The LECs further oppose any increase of the LEC productivity offset.[18] BellSouth notes that only one LEC for which price caps was not mandatory elected this form of regulation. If the Commission's mandatory productivity offset were too low, it argues, more LECs would have "flocked" to price caps.[19] Rochester says that the productivity offset of 3 percent

---

14 Hawaii Petition at 6; see also D.C. PSC Petition at 5; D.C. PSC Reply at 3.

15 ICA Opposition at 3-4.

16 Hawaii Petition at 7 (arguing that the California Commission utilizes a 4.5 percent offset in their plan).

17 Ad Hoc Petition at 12. But see Ameritech Opposition at 4 (several producitivity-enhancing technological breakthroughs occurred from the 1960's to the 1980's).

18 See, e.g., Pactel Opposition at 28-29; Centel Opposition at 4. Already, says BellSouth, the number is too high. BellSouth Opposition at 2; but see ICA Opposition at 3.

19 BellSouth Opposition at 2.

that the Commission established for AT&T strongly suggests that the 3.3 percent baseline offset applicable to exchange carriers is too high, not too low, since there is no reason to believe that interexchange operations will be less productive than exchange operations.[20] BellSouth claims that, based on the revised common line formula, the LEC productivity offset should be no higher than 2.3 percent, to be comparable with that established for AT&T.[21]

28. In the LEC Price Cap Order we carefully considered ICA's and Ad Hoc's criticism of inclusion of the 1984 data point in our short term study.[22] After extensive analysis, contained in Appendix C of that Order, we determined that the best way to estimate the overall growth between 1984/1985 and 1990/1991 was to use a trend regression over the entire time period. LEC Price Cap Order, 5 FCC Rcd at 6894, para. 28. We explained that an averaging technique that used all post-divestiture data gave a more complete picture of LEC post-divestiture productivity than would result from excluding one year. We emphasized in our analysis that a study of the post-divestiture period represented the most recent and thus potentially the most relevant period for assessing trends in the next four years. However, because such a study is necessarily based upon a limited set of data points and because there are so few data points available in the post-divestiture period, we needed to make use of each in our calculations.[23]

29. We recognized, of course, that there were certain problems with uncorrected data from 1984. We concluded, however, that statistical tests that showed that the 1984/1985 data point was an outlier were merely indications that the data point needed to be examined closely. We performed that examination and took pains to identify and correct errors in the data, adjusting for numerous exogenous factors and events. Ad Hoc discounts these efforts and continues to claim this data point is unreliable. However, in

---

20 Rochester Opposition at 8. See also BellSouth Petition at 2.

21 BellSouth Petition at 4. See also BellSouth Reply at 9. AT&T estimates that lowering the productivity factor as BellSouth proposes would reduce the consumer benefit of LEC price cap regulation by approximately $1.8 billion over the first four years of its application. AT&T Opposition at 3-4.

22 Contrary to ICA's assertions that we failed to consider its submission, we note that the identical material, prepared by the same consultant, was also submitted by Ad Hoc; the Commission cited and referred to this material in the updated versions of its studies. See LEC Price Cap Order, 5 FCC Rcd at 6892, Appendix C n.20; 6934, Appendix D n.15. The Commission's decision to review and correct the 1984 data point was based largely on the points raised in this study.

23 Accord Rochester Opposition at 7-9.

light of our extensive corrections, we believe Ad Hoc's position to be unreasonable.[24] Moreover, as Ameritech notes, the Commission's productivity conclusions were not based entirely on the use of our post-divestiture staff study that contained the disputed 1984 data point.[25] In addition to that study, we considered the conclusions of our long term staff study that encompassed a longer series of data from a range of economic conditions. As we explained in the LEC Price Cap Order, the virtue of this study was that it provided more stable results and was less subject to economic variations and short term events. LEC Price Cap Order, 5 FCC Rcd at 6798, para. 98 and Appendix D. In short, we have already addressed and resolved the concerns argued here by Ad Hoc and others.[26]

30. Nor do we agree with claims that studies that we relied upon in our calculation of LEC productivity fail to account for future technological trends that will impact costs.[27] While we believe that new telecommunications and data processing technologies will likely increase network efficiency and reduce the cost of providing telephone service, neither Hawaii nor ICA presents data that refutes the well established fact that the communications industry, since its inception, has been marked by technological innovation. This being the case, our productivity factor, based on the historical experience of the industry, already reflects this characteristic.[28]

---

24 Accord BellSouth Opposition at 4 (in light of the adjustments made, there is no justification for ignoring 1984 data); USTA Opposition at 2; Pactel Opposition at 30; BellSouth Opposition at 3.

25 Ameritech Opposition at 2-3. See also Rochester Opposition at 7.

26 The D.C. PSC, reiterating arguments made in prior rounds, states that the indirect productivity studies included in the Order are an inadequate substitute for more direct measures of inputs and outputs. D.C. PSC argues that, for the indirect studies to be valid, prices under rate of return regulation must be a reasonable proxy for efficient cost, the inflation measure must accurately track inflation experienced by LECs, and exogenous costs must be accurately defined. D.C. PSC Petition at 8-10. This issue was considered in an earlier round of the price cap proceeding. See Further Notice, 3 FCC Rcd 3406, para. 381. Although direct measurement of productivity has the apparent advantage of capturing the exact productivity achieved by the LECs or AT&T, the task of measurement is fraught with conceptual and practical difficulties, and much of the necessary data are not publicly available. For these reasons, we concluded that the Commission should not undertake its own direct measurements of AT&T or LEC productivity as part of the price cap formula. See also USTA Opposition at 2-4.

27 Accord Ameritech Opposition at 4; USTA Opposition at 2-4.

28 See Supplemental Notice, 5 FCC Rcd at 2228, para. 107. In addition, as

31. Finally, we reject BellSouth's claim that it was arbitrary and capricious for us to set a higher base productivity offset for the LECs than we previously adopted for AT&T. As AT&T correctly argues, our adoption of a higher productivity offset for LECs than was previously established for AT&T does not mean that the LECs will face a greater productivity requirement than has been placed on AT&T. Rather, the LECs' productivity offset is reflective of the unique characteristics of the LECs, including their common line costs.[29] In other words, a superficial comparison of the two productivity numbers without a consideration of the context in which each was derived and is being applied is meaningless. Our determination of a proper set of productivity offsets for LECs was based upon detailed studies of actual LEC experience, adjusted to take account of carrier common line, developed following the AT&T proceeding. These analyses provide a more reasonable calculation for the LEC productivity offset than simply adopting the AT&T offset.

32. Accordingly, we affirm the productivity offsets that the Commission selected in the LEC Price Cap Order. These offsets are supported by studies made part of the record that take into account the various criticisms detailed above. Although we have carefully noted the limitations of both our short term and long term productivity staff analyses, we believe that the numbers produced by those analyses represent likely outcomes within a range of possible values.[30] As we stated in that Order, in setting the productivity offsets we have selected a conservative minimum figure within the range between our two studies, subject to a tightened no-sharing zone. We believe that this approach allows us to use the strengths of each of our studies to capture LEC productivity characteristics that are associated with both a long and short term view. Taken together with the revised common line formula, the basket and band limitations, and the sharing mechanism, the 3.3 percent offset should achieve a fair balance between ratepayers and LECs, while encouraging substantial productivity gains.

---

we have stated in earlier orders, we do not believe, as Hawaii asserts, that the designation of a 4.5 percent productivity offset for intrastate services in California should bear significantly on our selection of a productivity offset to be used in a federal price cap plan for interstate access. See Supplemental Notice, 5 FCC Rcd at 2228 n.191. Our price cap plan and the California plan obviously differ in significant respects. These differences may reasonably be reflected in varying productivity offsets.

29 Accord AT&T Opposition at 3-4.

30 LEC Price Cap Order, 5 FCC Rcd at 6798, para. 99.

2. Optional 4.3 Percent Offset

33. The Commission determined that LECs under price cap regulation should have the option of selecting a higher, more challenging productivity offset. We set this optional higher offset at 4.3 percent. LEC Price Cap Order, 5 FCC Rcd at 6801-02, paras. 126-129. This higher offset provides a strong profit incentive for LECs to reduce rates below what the PCI would otherwise require, by allowing them to retain a greater share of any earnings they are able to achieve above 11.25 percent. A LEC electing the 4.3 percent offset will reduce its rates by an additional 1 percent, and will entitle itself to try to reach an effective maximum 15.25 percent rate of return. The Commission reasoned that this potential for increased earnings should provide a substantial financial incentive for LECs to improve productivity further and to reduce rates up front, thereby providing ratepayers with immediate and permanent benefits.

34. Hawaii objects that no party to the proceeding had a chance to comment on the soundness of the Commission's present specification of two productivity factors. In Hawaii's view, the most evident problem, given that the LEC Price Cap Order does not address the parameters under which a LEC could choose one factor or another, is the potential it creates for LECs to engage in cost shifting from one tariff year to the next.[31] ICA does not request any specific change in the 4.3 percent offset or the associated sharing zone, but contends the feature is ill-conceived, because the benefits to the LEC are so small that it is unlikely to be chosen.[32]

35. The concept of optional, self-selecting productivity offsets associated with profit incentives was proposed by United.[33] The Commission's plan is a modification and simplification of United's concept.[34] The question of LEC productivity was a central issue in both the Second Further Notice and the Supplemental Notice, and we believe our adoption of an optional 4.3

---

31 Hawaii Petition at 7-8 (arguing that monopoly LECs could assign greater costs to a year in which they used the lower productivity offset, thus ensuring that they would not exceed the Commission's margin for profit sharing in any year, and keeping more money for themselves). See also ICA Petition at 2.

32 ICA Petition at 7.

33 United Supplemental Reply (in response to Supplemental Notice), filed June 8, 1990, at 1-10. See also LEC Price Cap Order, 5 FCC Rcd at 6801, para. 126.

34 See USTA ex parte, filed July 30, 1990; AT&T ex parte, filed July 10, 1990.

percent offset is a "logical outgrowth" of our original productivity proposal.[35] The Commission explained our reasons both for adopting this concept and for modifying it. We continue to believe that the additional option of a more challenging productivity offset provides LECs with a strong incentive to increase productivity and potential profits.[36] We have designed the "two-track" approach with the express purpose of providing the LECs with the flexibility to operate at the highest level of efficiency in order to generate the lowest possible rates. We believe that both the public and the LECs will be rewarded by this approach. Hawaii has not shown that it, or any other party, will be prejudiced by the "two-track" productivity approach. While we understand Hawaii's cost-shifting concern, we believe there is little risk that LECs will shift costs from year to year, making this shifting the basis of their planning. Accordingly, we do not perceive this cost shifting as a threat so likely or so substantial as to cause us to forego the goals we seek to achieve through establishing the optional 4.3 percent offset.

36. We have retained reporting requirements for LECs under price caps that will allow us to monitor and evaluate their performance. If it appears that the LECs are manipulating the plan to engage in cost shifting, we will take appropriate action to limit the plan's options. We are persuaded, however, that the potential benefits to be derived from the availability of this higher productivity offset greatly outweigh the chance of its manipulation by LECs. We would expect, in fact, that LECs would elect to use the higher offset in periods when they anticipated that their expenditures would be lower, and would find the established 3.3 percent offset challenging enough when their expenditures are high. We do not, however, foresee LECs delaying planned or necessary expenditures in one- or two-year periods in order to manipulate their earnings retention, as Hawaii fears.

3. The Common Line Formula

37. Common line rates present a unique problem in the price cap program. Common lines are local subscriber loops. Their cost is non-traffic sensitive, i.e., costs do not vary by how much or how little the loop is used. These costs are recovered in part by End User Common Line charges and in part by Carrier Common Line (CCL) charges. In fashioning the price cap plan, the Commission has sought to devise a formula for the common line basket that

---

35 See Action Alliance of Senior Citizens of Philadelphia v. Bowen, 846 F.2d 1449, 1455 (D.C. Cir. 1988).

36 For example, we believe ICA understates the incentives for LECs in choosing the higher offsets. A LEC can potentially earn 100 extra basis points by risking about 40 basis points, the effect of a 1 percent rate reduction. See Second Further Notice, 4 FCC Rcd at 3213-14.

would continue to achieve other important goals while also providing incentives for increased LEC productivity. In the LEC Price Cap Order, the Commission responded to concerns that specific equations proposed to determine carrier common line rates produced an unintended windfall to carriers. LEC Price Cap Order, 5 FCC Rcd at 6793-94, paras. 55-73. We revised these equations to reflect our conclusion that local exchange carriers should split the benefits of growth in minutes per line for the common line element with their ratepayers. We devised a "Balanced 50/50" formula to ensure that approximately half of the benefit of demand growth is reflected in reductions in CCL charges.

38. Some LECs do not oppose the Balanced 50/50 formula, recognizing that it provides at least limited incentives for LECs.[37] They consistently oppose the per line formula, which they contend would require a significantly lower productivity factor and provide the LECs with absolutely no benefit for increases in demand growth. Among customers and interexchange carriers, Ad Hoc opposes the USTA formula proposed by Ameritech and BellSouth, which would allocate virtually all benefits of demand growth to the LECs. Ad Hoc believes it is reasonable to encourage LECs to increase network usage, but that the nature of the incentives should reflect the extent of the LECs' likely contribution to demand growth. Overall, Ad Hoc characterizes the Balanced 50/50 formula as a "reasonable compromise."[38] AT&T, API, and NASUCA support the per line formula.[39]

---

37 USTA Opposition at 9-13; SWB Opposition at 4-5; Rochester Opposition at 10-13; NYNEX Opposition at 9-12; Bell Atlantic Opposition at 7. See also Centel Opposition at 4-6.

38 Ad Hoc Opposition at 12-13.

39 The petitions also propose two substantial modifications to the price cap plan, without providing sufficient support or evidence to warrant their adoption at the reconsideration stage of this lengthy, complex proceeding. ICA proposes that the Commission modify the common line formula by averaging the Balanced 50/50 formula for the base year with the per line value for the prior year. ICA contends that this variation would resemble the competitive market, by ending supplier gains from new efficiencies in a relatively short time period, one year following the year in which the gain is realized by the LEC. ICA Petition at 12, 15. ICA provides no analysis of the effect of this new formula variation, including the implicit change in the overall productivity offset it would require. It is also unclear how much, if any, incentive the ICA variation would leave to price cap LECs. Nor does ICA support its premise that the lifespan for a competitive firm's realization of efficiency initiatives is one year, rather than, for example, the four year period we have set for review of the formula. We find no basis for concluding that the ICA proposal is worth pursuing.

39. Two LECs contend that the Commission's revised Balanced 50/50 formula unfairly penalizes them by denying them a reasonable portion of the benefits of demand growth for non-traffic sensitive plant.[40] For example, BellSouth maintains that under the Balanced 50/50 formula, as much as 80 percent of non-traffic sensitive demand growth is being channeled to interexchange carriers, rather than the 50 percent assumed by the Commission.[41] Ameritech argues that a "fairer" portion of the benefits of demand growth for LECs is justified for three reasons. First, Ameritech says that attributing a lesser share of common line productivity to LECs is inconsistent with the overall productivity offset portion of the price cap formula. It contends that the Commission bases the overall LEC productivity factor on historical data that includes common line as the most productive part of the business (since common line usage has grown without commensurate growth in costs). Ameritech argues that to apply the overall productivity figure to the less productive parts of a LEC's business (special access and the traffic sensitive portions of switched access) while denying LECs the benefits of higher common line productivity is "incongruous and

---

MCI contends, also apparently for the first time, that the installation of large scale fiber optic facilities in the LEC transmission network renders historical traffic sensitive productivity measures obsolete. MCI urges the Commission to adopt some additional method to "recognize ratepayer contributions to TS growth, either by a higher productivity factor for that basket or some other method of sharing the benefits of demand growth." MCI Opposition at 12. The opportunities in this proceeding to submit evidence and analysis addressed to issues such as the proper productivity factor for traffic sensitive usage and the sharing of benefits have been extensive. MCI makes no meaningful showing that the existing record is inadequate or that the issue should now be reopened. Certainly it was well known that the LECs have been introducing fiber optics into their networks for several years, a period included in Commission productivity studies. MCI presents no basis for reconsidering the treatment of traffic sensitive switched services. Accord BellSouth Opposition at 10.

40 Ameritech Petition at 6; BellSouth Petition at 8. In a related vein, LECs assert that parties such as ICA that argue for a "per line" approach to capping common line rates, see infra, ignore the relationship between allocation of common line demand and the productivity offset. See USTA Opposition at 9; US West Opposition at 8-9; Ameritech Opposition at 7; BellSouth Opposition at 7. See also Bell Atlantic Opposition at 7.

41 BellSouth Petition at 8. In BellSouth's estimation, the LEC productivity offset should be set no higher than 1.8 percent, plus a 0.25 percent CPD, based on the change in the common line formula alone.

confiscatory."[42] BellSouth agrees with Ameritech that the Commission's revisions to the common line formula increase significantly the productivity improvements required of the LECs to break even under price caps.[43]

40. Second, Ameritech states that LECs should be provided a greater share of demand growth since they have the ability to influence network usage significantly, through their pricing behavior. According to Ameritech, the Commission's price cap program actually reinforces that fact, making changes in LEC access charges an exogenous factor in AT&T's price cap formula.[44] Third, Ameritech states that the introduction of new technologies and services by the LECs -- SS7 signalling, 800 data base services, call forwarding and call waiting, ISDN -- will stimulate usage. Moreover, it says, LEC advertising encourages calling and highlights the benefits of telephone service generally, which has a spillover effect on interstate traffic.[45] Ameritech concludes that the failure of the revised formula to achieve the Commission's goal of providing LECs with incentives to increase productivity should encourage the Commission to reconsider the Balanced 50/50 formula and to adopt the USTA indexing plan instead.[46] According to Ameritech, the USTA plan correctly gives LECs the benefit of usage growth for that portion of their common line revenue requirement recovered on a usage sensitive basis through the carrier common line charge.[47]

---

42 Ameritech Petition at 6.

43 BellSouth Petition at 8. Indeed, BellSouth contends that since the Commission has estimated that the change in the common line formula assigns an additional 70 basis points of productivity burden to the LECs, the Commission should assign the LECs a productivity offset that is 70 basis points lower than that assigned to AT&T.

44 Ameritech Petition at 6-7. According to Ameritech, an increase in access charges raises AT&T's PCI, by operation of AT&T's price cap formula, thus permitting AT&T (and other interexchange carriers) to raise prices and retard demand. However, Ameritech maintains that by lowering access charges, LECs could, in certain cases, force AT&T (and other interexchange carriers) to reduce prices and stimulate demand.

45 Ameritech Petition at 8.

46 Ameritech Petition at 5. Ameritech cites a USTA ex parte presentation of July 25, 1990, cited in the LEC Price Cap Order, 5 FCC Rcd at 6795, para. 72.

47 Ameritech Petition at 6. Thus, it says, in the case of a LEC with a common line revenue requirement split of 40 percent carrier common line and 60 percent subscriber line charge, usage growth would account for 40 percent of the common line revenue growth, and 60 percent of the common line revenue

41. While two LECs thus argue that LECs should be awarded virtually all the benefits of CCL demand growth, some interexchange carriers and large users argue that LECs should receive little or none. MCI contends that the Balanced 50/50 formula is arbitrary and inconsistent with the remainder of the plan, arguing that the examples of possible demand stimulation by the LECs do not support the rationale that the formula provides incentives to increase usage per common line. MCI argues that the LECs already have adequate incentives and the formula gives LECs a windfall for effort that would have occurred anyway.

42. For example, MCI claims that installation of new technologies, improvements in network facilities and operations and developing new common line-based services -- that allegedly will increase usage -- do not require any additional incentive.[48] Moreover, it says, these technological improvements to the network should lower the LECs' costs of supplying access services, which, in and of itself, should provide more than an adequate reward to stimulate such investments. MCI further disputes the Commission's suggestion that LEC advertising and improvements in billing and collection services will have a measurable impact on usage.[49] MCI also argues that incentives for LECs to market their own foreign exchange and interexchange services are unnecessary, and that the services are relatively inconsequential in volume. Moreover, MCI argues, because the Balanced 50/50 formula will allow higher rates than would occur under rate of return regulation or a per line cap, it will dampen demand that it is supposedly intended to stimulate. MCI contends that these losses in demand are certain and measurable and cannot be justified by speculative incentives, and that the Balanced 50/50 formula must be replaced by a formula that rewards LEC customers with all of the benefits of demand growth, known as a "per line" cap.

---

growth would be attributable to growth in lines.

48 MCI quotes GTOC that "the telecommunications infrastructure of the United States is not inferior to that of any other country in the world" and states that this accomplishment was achieved under a regulatory regime in which ratepayers received 100 percent of the benefit of common line growth (as well as 100 percent "sharing" of any overearnings above a small buffer). If the current level of infrastructure could be developed when the LECs received no common line growth benefits, MCI says, it is difficult to understand why it is necessary to give the LECs 50 percent of the benefit now. MCI Petition at 7.

49 According to MCI, the LECs are already overly rewarded, through existing separations rules, for advertising. MCI Petition at 7.

43. MCI argues that our decisions to adopt the Balanced 50/50 formula for the common line basket and to retain the proposed traffic sensitive and special access indices compel us to adopt a different treatment of expenses associated with those baskets. For the common line basket, MCI argues that because the Commission gave LECs about half the benefit of common line demand growth based in part on demand stimulation brought about by LEC advertising and marketing (in contrast to rate of return, where access ratepayers receive the full benefit), the common line PCI must be adjusted downward initially to remove half of advertising and marketing expenses attributable to common line services. For the traffic sensitive and special access baskets, MCI contends that "a similar adjustment" should be made in the initial traffic sensitive and special access PCIs, to prevent LECs from reaping "all of the benefits of [traffic sensitive] [and special access] growth, which results largely, if not entirely from the action of interstate access ratepayers."[50] MCI also argues that an adjustment must be made on a going-forward basis to remove half of advertising and marketing expenses associated with common line and all such expenses associated with traffic sensitive and special access from the calculation of LEC earnings liability for purposes of computing sharing amounts.[51]

44. Procedurally, these issues are properly under consideration by the federal-state joint board currently studying the separations rules governing advertising, to the extent that they concern allowable interstate costs.[52] To the extent that they request below-the-line treatment of advertising and marketing expenses, revisions to existing rates, or different methods of calculating rates of return for sharing, these arguments should have been raised in one of the various comment rounds in this proceeding. In any case, MCI's arguments in support of these revisions have no merit. Most obviously, MCI demands the disallowance of 50 percent of <u>total</u> common line advertising and marketing expenses, even those allowed under rate of return, because LECs will benefit from half the benefit of <u>growth</u> in usage per common line. Advertising and marketing support both current usage and increases at the margin. There is no justification for disallowing 50 percent of these expenses because a few percent of total usage is recognized as a LEC productivity gain.

45. More fundamentally, the proposal is inconsistent with the price cap program. First, the Commission's premise that LEC advertising and marketing can influence growth in common line usage was not limited to or even primarily associated with advertising and marketing allocated by separations to interstate common line, but with LEC promotion of telephone service use

---

50 MCI Petition at 13. <u>See also</u> ICA Petition at 12-13.

51 MCI Petition at 13; MCI Reply at 13-15.

52 <u>Accord</u> SWB Opposition at 5-6.

generally.[53] Second, MCI ignores the interrelationship between the Balanced 50/50 formula and the productivity offset. The offset was based on the historical record of LEC productivity growth under rate of return regulation, adjusted as though the formula had been in effect, to establish a productivity target that will both make ratepayers better off than rate of return and introduce productivity incentives. It is this overall offset that largely provides benefits to customers, not any specific cost allocation or allowance.

46. Costs and productivity growth associated with advertising and marketing were included in these baseline calculations. Removal of advertising and marketing expenses and associated productivity growth would necessitate a readjustment of the offset, but would not necessarily benefit ratepayers. It would also arbitrarily distort the LECs' incentives, because it would reduce the PCI regardless of the productivity benefits that might be achieved by such expenditure. Third, it is not clear why MCI singles out advertising and marketing expenses for disallowance. The Commission cited several ways in which LECs can encourage higher common line usage, including technological improvements, yet MCI does not seek disallowance of amounts that might be associated with such improvements or other LEC initiatives. In fact, any such disallowances to PCIs would interfere with the balance of objectives in price caps. The price cap plan focuses on results and permits LECs increased flexibility in achieving these results, including flexibility in deciding where to focus expenditures. That flexibility would be undercut by arbitrary disallowances. Fourth, with respect to the request that half or all advertising and marketing expenses be disallowed from current rates and the calculation of the earnings to be shared with customers, MCI presents no demonstration that those expenses have been or will be imprudently incurred or otherwise should be disallowed.[54]

47. The debate over the common line formula is in large part a dispute over the extent to which LECs actually have or can develop the ability to influence customers' usage of common lines. In the LEC Price Cap Order, the Commission concluded that there are several identifiable opportunities for LECs to encourage higher, more efficient usage of common lines. These include encouraging greater use of services LECs provide themselves, introduction of new and improved technologies and service features, and advertising and marketing. While the Commission discarded an earlier formula and thus substantially reduced the extent to which LECs were credited with higher demand growth, it judged that the LECs should be given some incentive to contribute to this type of efficiency gain. None of the parties provided

---

53 Accord BellSouth Opposition at 8-11 (MCI does not demonstrate that the advertising expenses were imprudently incurred).

54 Accord BellSouth Opposition at 10-11.

information to quantify the extent to which either the LECs or the interexchange carriers can help achieve this type of efficiency, but we judged that the Balanced 50/50 formula, which provides incentives to both, would be a reasonable part of the overall price cap plan, at least until further review in the fourth year performance review. LEC Price Cap Order, 5 FCC Rcd at 6794-95.

48. The reconsideration petitions largely reargue the extent of the LECs' ability to influence common line demand growth, as a basis for largely repeating their support for formulas that assign virtually all benefits of demand to the LECs or the interexchange carriers. Each side claims that its favored approach is more consistent with the theory of the price cap plan than the Commission's Balanced 50/50 formula.

49. Among the LECs, most raise no objection to the Balanced 50/50 formula, but two continue to urge a formula that gives the LECs virtually all the benefit of CCL demand growth. Ameritech cites three reasons to increase the benefits to the LECs, but none is persuasive. First, Ameritech argues that the Commission's reduction of the share of benefits attributed to the LECs is inconsistent with the productivity offset; but Ameritech overlooks the fact that the Commission expressly adjusted the offset downward to take the new formula into account. See LEC Price Cap Order, Appendix C, 5 FCC Rcd at 6885. Ameritech presents no basis for questioning or modifying this adjustment.[55]

50. Second, Ameritech's contention that LECs deserve a greater share of demand growth, because they have the ability to influence network usage significantly through their pricing behavior, is already recognized in the Balanced 50/50 formula. If LECs reduce their CCL rates, they can force lower interexchange carrier prices and stimulate demand, as Ameritech claims. But this option exists only for the 40 percent of LEC common line revenues recovered by CCL rates, and the same effect can be achieved by the interexchange carriers themselves by lowering their rates. It seems far more appropriate under these circumstances to apply the Balanced 50/50 formula only to the CCL portion of the total category, and to split the benefits of CCL demand growth, not to assign all of it to either the LECs or the interexchange carriers.

---

55 We also find no basis for BellSouth's implication that the LEC productivity offset should be set in relation to AT&T's, and 70 basis points (or 0.7 percent) lower to reflect the productivity burden of the change in common line formula. BellSouth Petition at 8. The productivity offset was developed based in large part on the historical performance of the major LECs, not simply that of AT&T. It was also adjusted appropriately to reflect the revised common line formula. Indeed, the unique characteristics of common line make direct comparisons difficult.

51. Similarly, we agree with Ameritech that introduction of new technologies and services, advertising, and other activities by the LECs can stimulate usage. But it is equally true that the interexchange carriers also engage in such activities and also stimulate usage. See LEC Price Cap Order, 5 FCC Rcd at 6794-95, para. 66. The Balanced 50/50 formula provides benefits to both LECs and interexchange carriers, and more reasonably reflects the roles of both than does the USTA formula.

52. Those who contend that LECs should be denied any share of the benefits of CCL demand growth also go too far, in our judgment. MCI asserts that the various means we identified through which LECs can influence CCL demand growth should be ignored, or that the status quo provides adequate incentives for LEC productivity. For example, MCI contends that even though the LECs do provide end user services using common lines, they need no additional incentives to spur usage, and the services are proportionately small. But this argument misses the point of price caps. The issue is not whether the LECs "need" additional incentives, but whether those incentives will produce benefits to the public and the industry that would not otherwise have existed. Higher levels of productivity are desirable benefits even if they are not necessities.

53. MCI apparently does not deny that LEC efforts to introduce new and improved technology, facilities and services can also encourage CCL demand growth. It contends, rather, that LECs need no additional incentive because the United States infrastructure is already up to world standards under rate of return regulation, and technological improvements will lower LEC costs and allow LECs to earn "fabulous profits." Here, too, MCI is satisfied with too easy a target. We expect that price caps will provide incentives for LECs to provide even better, more efficient services and facilities than under rate of return regulation, and an infrastructure that increasingly improves upon the state of the art. We have thus expressly included in the price cap plan obligations and incentives for LECs to become more efficient and then to share with customers the profits that higher efficiency generates. The Balanced 50/50 formula fits well within this plan to provide an incentive for particular productivity gains that might otherwise be untapped.

54. MCI also argues that additional LEC advertising would be useless and economically inefficient and that the Commission should not encourage more. But this again misses the point. We are not seeking to encourage more LEC advertising, only to recognize efforts that prove effective in increasing usage and thus efficiency in practice. To the extent that increased or improved advertising and marketing are cost-effective, the Balanced 50/50 formula provides the incentive for LECs to move in that direction, but not simply to increase the amount.

55. Finally, MCI considers it "unlikely" that anything the LECs do in billing and collection will stimulate common line usage. Curiously, though, it seeks to make this point by arguing that LEC billing and collection rates will

in fact affect CCL demand, predicting that high LEC billing and collection rates will dampen demand. But MCI's own per line formula is insensitive to demand, and thus provides no incentive for LECs to either lower billing and collection rates or improve the service. The Balanced 50/50 formula, by contrast, does encourage LECs to avoid behavior that dampens demand. As Ameritech suggests, it actually encourages LECs to set lower rates that will stimulate demand growth. The various ways that LECs can encourage CCL demand growth represent a source of potential productivity growth that we should foster.

56. MCI also argues that because the Balanced 50/50 formula initially allows higher CCL rates than the per line formula, demand might be suppressed by enough to outweigh any benefits from LEC efforts or initiatives. First, it should be recognized that long distance services that use common lines also use the other switched access rate elements. Customer bills will reflect both CCL and traffic sensitive switched access charge elements, and the net effect of price caps on end users is affected more directly by the overall productivity offset, which is a function of both historical productivity and the Balanced 50/50 formula. The offset assures that overall access charges for interstate long distance services will decrease in real terms, thus stimulating demand.

57. Moreover, as we discussed in the Order, in the long run and in the overall operation of the plan, customers should receive greater benefits under the Balanced 50/50 formula. They will be less affected by falling demand in times of economic downturn. More importantly, the stimulus to greater productivity should result in improved services and features, and half the benefits of productivity gains that might otherwise not have occurred. While the precise extent of these advantages is necessarily uncertain, we believe they are real and important. We also remain committed to review demand growth and, if necessary, adjust the formula during the fourth year performance review.

C. Exogenous Costs

58. In the LEC Price Cap Order, we recognized that some cost changes triggered by administrative, legislative, or judicial action beyond the control of the carriers would not be reflected in the other components of the Price Cap Index. We called these costs "exogenous," and found that these costs should result in an adjustment to the Price Cap Index. We found that exogenous costs include separations changes, amendments to the Uniform System of Accounts (USOA), changes in long term support and transitional support payments, the expiration of amortizations, and the reallocation of regulated and nonregulated costs. We decided that other costs should be classified as endogenous, i.e., such cost changes do not affect price cap index levels. LEC Price Cap Order, 5 FCC Rcd at 6807, para. 166.

1. Other Post-Employment Benefit Costs

59. Other Post-Employment Benefits (OPEB) is the accounting term used to describe health and other benefits corporations provide to their retirees. The Financial Accounting Standards Board (FASB), the body responsible for establishing Generally Accepted Accounting Principles (GAAP), has amended GAAP to require accounting treatment of OPEB costs on an accrual basis starting in 1992.[56] In the LEC Price Cap Order, we stated that price cap regulation does not affect our prior practice of requiring carriers to notify us of their intention to implement a change in GAAP. LEC Price Cap Order, 5 FCC Rcd at 6807, para. 168. We stated that where we find a GAAP change to be compatible with our regulatory accounting needs, we will consider whether amendment of our Uniform System of Accounts is necessary or desirable. We stated that no carrier could treat GAAP changes as exogenous until we approved the change, and that exogenous treatment would not be granted until FASB had actually approved a change in GAAP, and the change became effective.

60. AT&T says that some LECs have begun accounting for OPEB costs on an accrual basis, and therefore OPEB costs are embedded in the price indices for these LECs. AT&T notes that when it attempted to include OPEB costs as exogenous, the Common Carrier Bureau denied exogenous treatment, finding that the FASB change had not yet become effective.[57] AT&T argues that there is no reason to treat LEC OPEB costs differently than AT&T OPEB costs.[58] AT&T advocates reducing the PCIs of LECs who included OPEB costs in their rates prior to the effective date of price cap tariffs.[59] MCI argues that, since FASB does not require accrual treatment of these costs until 1992, this change is voluntary and therefore does not deserve exogenous treatment as a change in GAAP standards.[60] ICA states that OPEB accounting standards may be revised before 1992, and therefore supports endogenous treatment of these costs.[61]

---

56 Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 106, December 1990 (FASB Statement No. 106).

57 AT&T Petition at 3-6 (citing FASB Statement No. 106). See American Telephone and Telegraph Company, Revisions to Tariff F.C.C. Nos. 1, 2, and 13, 5 FCC Rcd 3680 (Com.Car.Bur. 1990) (OPEB Order).

58 AT&T Petition at 5-6.

59 AT&T Petition at 5-6; AT&T Reply at 2-4.

60 MCI Petition at 34; MCI Reply at 40.

61 ICA Opposition at 8.

61. The OPEB expenses some LECs have embedded in their July 1990 rates were introduced pursuant to existing accounting rules that permitted LECs, at their option, to change their accounting treatment of OPEB expenses.[62] No change in GAAP was necessary, no change in our USOA was necessary, and therefore no Commission notification was required for these LECs to implement a different way of accounting for OPEB expenses. Carriers that chose to accrue OPEB expenses were not more "right" or "wrong" than carriers that chose to await the GAAP change. Under the rate of return regulatory structure, as long as the carrier's costs are reasonable and prudent, those costs can be used in the ratemaking process to justify rates.

62. Our change in regulation, from rate of return to price caps, should not result in our changing the treatment of such costs. While a regulatory change may affect prospective treatment of these expenses, costs and rates that have been accepted as reasonable and prudent under prior standards should not be treated as unreasonable or imprudent merely because our regulations have changed.[63] Indeed, those seeking to exclude OPEB expenses from price indices do not make such a claim. They focus instead on the "fairness" issues raised by our price cap decision to consider exogenous cost treatment of GAAP changes at the time the GAAP change is implemented, in this case 1992.[64] Our decision not to consider exogenous treatment of GAAP changes, including OPEB expenses, until the GAAP change becomes effective is one grounded in the orderly administration of our price cap system. The requirement ensures that we will not be called upon to render decisions prior to the time FASB has made a final ruling.[65] We believe such a requirement will be helpful to our administration of price cap regulation. We believe declining to decide this OPEB issue until it becomes ripe will result in fairer treatment of the LECs. Under this decision, carriers that elected to wait until the GAAP change becomes effective before expending funds for OPEB are not necessarily foreclosed from recovering these costs. Instead, we will consider requests for exogenous treatment at that time. On the other hand, removal now of already-accrued OPEB expenses from initial price cap rates would not only redefine "reasonable" after the fact, but it would also foreclose carriers from any recovery of expenditures already made.

63. Carriers may always attempt a showing demonstrating why they should not be held to the general requirement, supported by reasoned analysis giving good cause for the requirement to be waived. However, the carriers objecting

---

62 Section 32.16 of the Commission's Rules, 47 C.F.R. § 32.16.

63 BellSouth Opposition at 12-13; SWB Opposition at 17-18.

64 AT&T Petition at 5-6; MCI Petition at 34; GTOC Opposition at 17-19.

65 See OPEB Order, 5 FCC Rcd at 3680.

here merely allege that our decision to address OPEB issues in 1992 is unfair to companies that had not switched to accrual accounting while they were under rate of return regulation.[66] This is not a sufficient basis to advance consideration of exogenous treatment of a FASB-approved GAAP change. As stated here and previously, we will consider such applications for exogenous treatment only at the time the change becomes effective. Further, the test of whether to grant exogenous treatment of GAAP changes is not restricted to whether the change is outside the control of the carrier, as GTOC suggests.[67] As we discussed in the AT&T Price Cap Reconsideration Order, the determination of whether a particular GAAP change is exogenous includes an analysis of whether the cost change will be reflected in the inflation variable of the PCI.[68] If a GAAP change is universal enough to be reflected in the inflation measure, exogenous cost treatment would result in double counting within the context of the PCI.[69]

2. Equal Access Costs

64. In the LEC Price Cap Order, we decided to treat all equal access costs endogenously, since the mandatory price cap LECs have converted most of their end offices to equal access, and have embedded most of these costs in their initial price cap rates. Given this, the Commission found that it was not necessary to further encourage equal access conversion by treating those costs exogenously. We also noted that difficult issues might arise in terms of our ability to review the equal access costs claimed as exogenous, and that the declaration of equal access costs as exogenous would itself provide an incentive for LECs to claim costs as "equal access" costs. LEC Price Cap Order, 5 FCC Rcd at 6808, paras. 180-181.

65. Several petitioners argue that equal access costs associated with pay telephones should be exogenous because, contrary to the statements in the LEC Price Cap Order, equal access costs associated with payphones are not embedded in going-in rates. The BOCs argue that the U.S. District Court

---

66 See, e.g., GTOC Opposition at 17-19.

67 GTOC Opposition at 17-19.

68 AT&T Price Cap Reconsideration Order, 6 FCC Rcd at 674, para. 75.

69 Since we are not requiring LECs with embedded OPEB costs to adjust their PCIs downward, we need not address LEC arguments that the creation and funding of Voluntary Employee Benefit Association (VEBA) trusts should be treated differently than accrual of OPEB expenses for the purposes of deciding whether to decrease PCIs. See US West Opposition at 4-6; Ameritech Reply at 9; Bell Atlantic Opposition at 11-12; BellSouth Opposition at 11-12; Pactel Opposition at 25-26; Ameritech Opposition at 24-25; SWB Opposition at 17-18.

required the BOCs to make this conversion by May 1991.[70] In addition, Pactel and Ameritech are concerned that the carrier identification codes for 800 and 900 numbers may soon be exhausted, and request exogenous treatment for the costs of converting to four-digit carrier identification codes.[71] Pactel maintains that the Commission requires LECs to make carrier identification codes available on a non-discriminatory basis.[72] Pactel concludes from this that costs associated with exhaustion of carrier identification codes are triggered by administrative action and are therefore "beyond the carrier's control."[73] Finally, SWB and Rochester renew arguments for differentiating exogenous cost treatment of equal access based on carrier size. LEC Price Cap Order, 5 FCC Rcd at 6808, para. 181 & n.197. They contend that small and mid-sized LECs do not have control over equal access costs, because these companies must convert an end office within three years of a bona fide request from an interexchange carrier, and because LECs have little control over switch modification costs or allocation and balloting costs.[74] Rochester also asserts that many small LECs have not yet embedded equal access costs in their rates. Furthermore, Rochester is concerned that small LECs will be converting to equal access in a price cap environment, and that the operation of the all-or-nothing rule prevents carriers from passing these costs on to their customers.[75]

66. We decline to carve out exceptions to our requirement that equal access costs be treated as endogenous. With respect to the costs of converting payphones to equal access, as well as the costs of redesigning carrier identification codes, the parties' arguments continue to focus solely on the issue of whether the costs are being incurred at carriers' initiative or at the behest of some other entity. None of the parties seeking exogenous treatment of these costs addresses the concerns we identified in the LEC Price Cap Order that led us to deny exogenous treatment -- the incentives exogenous

---

70 BellSouth Petition at 21-22; Pactel Petition at 2-3; NYNEX Opposition at 16; SWB Opposition at 15-16, citing United States v. Western Electric Co., 739 F. Supp. 1, 12-13 (D.D.C. 1990).

71 Pactel Petition at 3-6; Ameritech Opposition at 23.

72 Pactel Petition at 4, citing Petition of First Data Resources, Inc., Regarding the Availability of Feature Group B Access Service to End Users, slip op., released May 28, 1986; Pactel Reply at 11-12.

73 Pactel Petition at 5.

74 Rochester Petition at 8-10; SWB Opposition at 16.

75 Rochester Petition at 11-13. But see MCI Opposition at 27-28 (dismissing this argument as an attempt to discredit the all-or-nothing rule).

cost treatment could create to inflate the amounts spent on equal access. LEC Price Cap Order, 5 FCC Rcd at 6808, para. 180. We continue to believe that the public interest is better served by creating a regulatory system that provides incentives for LECs to implement equal access in as efficient a manner as possible, recognizing that it is the carrier alone that is capable of controlling costs.[76] Thus, we distinguish equal access costs from other costs that we treat as exogenous, such as rule changes, in which the cost change is derived solely from a change in regulation.[77]

67. With respect to concerns about equal access costs that small and mid-sized companies face when served with an equal access request by an interexchange company, we remain concerned that such a LEC could be unfairly penalized by endogenous treatment of equal access costs. Unlike the largest LECs, the equal access costs of small and mid-sized LECs as a group are less complete. However, none of the parties to this reconsideration has raised any new arguments that were not considered in the LEC Price Cap Order. Nor have petitioners argued that our concerns about exogenous treatment of such costs are somehow ameliorated in the case of small and mid-sized carriers. We continue to believe that our decision to make price cap regulation optional for all but the eight largest LECs guards against inequitable treatment of equal access costs. The requirement that LECs electing price caps must do so

---

76 SWB argues that LECs should have the right to petition for exogenous treatment of equal access costs imposed by other judicial orders. SWB Petition at 20. Given that the Commission has specifically listed the exogenous costs carriers may claim in Section 61.45(d)(1) of the Commission's Rules, petitions for waiver can be filed pursuant to Section 1.3. 47 C.F.R. § 1.3.

77 We also decline to adopt MCI's suggestion to treat BOC equal access costs in the same way we do amortizations, and require a downward adjustment in PCI levels in 1994 to eliminate all equal access costs. MCI argues that January 1, 1994, is the date when AT&T is required to reimburse the BOCs for any unrecovered equal access costs, and that the BOCs will have fully recovered their costs at that time. MCI Petition at 31-32. The issue to be addressed is whether the BOCs will experience any cost change in 1994 that stems from factors beyond their control. Under price cap regulation, we have not treated changes in depreciation levels as exogenous, so that when a piece of equipment is fully depreciated, there is no PCI change. Nor is there a PCI change if a carrier speeds up or slows down the rate at which it recovers investment. This is consistent with our view that the price cap index should be devoid of cost indicators over which the carriers exercise control. Based on the meager factual record presented on the issue of equal access costs, we are reluctant to depart from our practice of not adjusting PCI levels to reflect levels of cost recovery.

on an all-or-nothing basis does not alter our conclusion.[78] One of the criteria a prospective volunteer for price cap regulation must consider is the endogenous treatment of equal access costs.

3. Tax Law Changes

68. Since most changes in the tax laws affect all businesses generally, and not just local exchange carriers, they are reflected in the GNP-PI. We therefore decided that these changes should be presumptively endogenous. LEC Price Cap Order, 5 FCC Rcd at 6808, para. 176. Ameritech, Centel, and SWB dispute that tax law changes and tax normalization amounts are reflected in the GNP-PI, and argue that tax changes should be exogenous.[79] US West argues that any tax law change will affect LECs more than the economy as a whole, because telecommunications is a capital-intensive industry, and the tax code is designed to encourage capital investment. US West argues that all tax law changes should be exogenous for this reason.[80] SWB argues that the LECs should be allowed to demonstrate why a tax law change should be given exogenous treatment.[81]

69. We stated in the LEC Price Cap Order that if a LEC can show that a particular tax law change produces costs not reflected in the GNP-PI, we will consider exogenous treatment of that tax law change. We affirm that this will be our approach, and decline to give automatic exogenous treatment to any tax law changes. We remind the LECs that, with respect to exogenous treatment of tax law changes, the issue we will focus on is one of double counting a cost change, once as an exogenous cost change and once in the GNP-PI. Broad claims that LECs as a group are capital intensive are not sufficiently probative of the double counting issue.[82] As we stated in the LEC Price Cap Order, the burden is on the LECs to show the absence of double counting.

---

78 See MCI Opposition at 27-28.

79 Ameritech Petition at 20; Ameritech Opposition at 23; Centel Opposition at 11; SWB Petition at 23-24.

80 US West Opposition at 6-8.

81 SWB Reply at 9. SWB asserts that approximately 4 percent of changes in tax liability are reflected in the GNP-PI. SWB Petition at 17-18. See also CBT Reply at 9-10; Centel Opposition at 7. But see Ad Hoc Opposition at 15-17 (tax law changes are reflected in the GNP-PI); ICA Opposition at 7 (if tax law changes do not affect the GNP-PI, then they do not affect the economy as a whole, and therefore should not affect telephone rates either).

82 See MCI Opposition at 31-32; Ad Hoc Opposition at 17-18.

70. Several petitioners maintain that two specific tax law changes should be considered exogenous; namely, the flow-through of excess deferred taxes due to the reduction of the corporate tax rate from 46 to 34 percent, and the repeal of the investment tax credit, both resulting from the Tax Reform Act of 1986.[83] These parties contend that endogenous treatment may require LECs to flow through the tax benefits of these changes faster than is allowed by Section 203(e) of the Tax Reform Act.[84] In addition, they argue that there is no reason to treat the decreasing amortization of unamortized investment tax credits and the flow-through of excess deferred taxes differently for price cap purposes from the expiration of a reserve deficiency amortization, which is treated exogenously.[85]

71. MCI too advocates that the flow-back of excess deferred taxes not be treated endogenously, arguing that endogenous treatment of these tax changes would enable LECs to flow back only some of the excess taxes collected from ratepayers in prior years.[86] MCI advocates reflecting the effects of the 1986

---

83 See, e.g., Ameritech Petition at 21-22; BellSouth Petition at 23-24; USTA Petition at 25; Ameritech Reply at 8-9. Deferred taxes represent tax expenses which are deferred to a future accounting period pursuant to the tax normalization methods described in Section 32.22 of this Commission's Rules, 47 C.F.R. § 32.22. The Tax Reform Act, Pub. L. No. 99-514, 100 Stat. 2146, in reducing the corporate tax rate, gave rise to excess deferred taxes. Because of this reduction in the tax rate, funds set aside to pay taxes at 46 percent will now be used to pay taxes at 34 percent, so part of the reserve is "excess." According to Section 203(e) of the Tax Reform Act, common carriers are to flow back these excess deferred taxes to ratepayers not in a lump payment, but instead by following the "average rate assumption method," which spreads the payment over a period of years roughly corresponding to the life of the asset. Section 203(e) states: "A normalization method of accounting shall not be treated as being used with respect to any public utility property ... if the taxpayer, in computing its costs of service for ratemaking purposes and reflecting the operating results in its regulated books of account, reduces the excess tax reserve more rapidly or to a greater extent than such reserve would be reduced under the average rate assumption method."

84 Ameritech Petition at 21-22; USTA Petition at 25. BellSouth argues based on Section 203(e) that these tax changes are utility-specific, and therefore would not be reflected in the GNP-PI. BellSouth Petition at 23-24.

85 BellSouth Petition at 23-24; Ameritech Petition at 23-24.

86 MCI Petition at 33. While the LECs' petition for exogenous treatment focuses on the future expiration of the payback "amortization," MCI is concerned with current rates. If LECs are not required to adjust their rates to reflect the total yearly impact of the flow-back of excess deferred taxes,

Tax Reform Act as an adjustment to the productivity offset.[87] When we developed our productivity offset, we adjusted our data for the effects of the 1986 Tax Reform Act. LEC Price Cap Order, Appendix C, 5 FCC Rcd at 6887.[88] We will not double count these effects as MCI suggests.

72. When Congress enacted the Tax Reform Act of 1986, the tax liability of telephone companies was reduced, as was the liability to be covered by their deferred tax reserves. In order to flow through these tax benefits to their customers, the LECs have set their rates lower than they would have absent the 1986 Tax Reform Act. In essence, the LECs are asking for an exogenous increase in their PCIs each year as the flow-through of these tax benefits declines. While the Tax Reform Act of 1986 reduced the tax liability of all businesses, only utility companies are prohibited from flowing through these tax benefits immediately.[89] In reaction to a tax cut, or any other decrease in costs, most firms in the economy would be driven by competitive pressure to lower their prices shortly after the decrease. Therefore, most of the effects of the 1986 Tax Reform Act were likely reflected in the GNP-PI of 1987, and the 1986 Tax Reform Act reduction of the tax rate and repeal of the investment tax credit are unlikely to be reflected in the GNP-PI today. We therefore grant LECs' requests for exogenous treatment of the flow-through of the benefits of the Tax Reform Act of 1986.[90] As the flow-through of these

---

MCI argues, they will never pay these excesses back except for the possibility of a partial pay-back if their earnings levels activate the sharing mechanism. Rather than advocating exogenous treatment of these changes, however, MCI urges that LECs' productivity offsets should be increased to reflect their lower costs. Since tax changes are generally assumed to be reflected in the GNP-PI, MCI states, and because this one is not, a way to take account of the effects of the Tax Reform Act is to modify the productivity offset so that the Tax Reform Act registers on LEC prices just as it would if it were reflected in the GNP-PI. This adjustment would allow the effect to be smoothed out over time, rather than requiring an annual adjustment, as exogenous treatment would do. MCI Reply at 37-38.

87 MCI Petition at 33; MCI Reply at 37-38.

88 Accord USTA Opposition at 18-19; SWB Opposition at 4-5.

89 Utility companies are not permitted to flow through excess deferred taxes at a rate "more rapidly or to a greater extent than such reserve would be reduced under the average rate assumption method." Tax Reform Act of 1986, Section 203(e)(1), 100 Stat. at 2146. For a discussion of the "average rate assumption method," see Tax Reform Act of 1986, Section 203(e)(2)(B), 100 Stat. at 2146.

90 This result is not inconsistent with endogenous treatment of changes in depreciation. Common carriers control their depreciation costs through their

effects declines, each price cap LEC may include in its annual filing data showing the effect on its PCI.[91]

4. Depreciation Rate Changes

73. The Commission found that depreciation rate changes should be endogenous, since LECs control their depreciation costs through their decisions to deploy or retire equipment. LEC Price Cap Order, 5 FCC Rcd at 6809, para. 182. Several LECs, renewing arguments made in prior rounds, deny that they have control over depreciation costs sufficient to warrant endogenous treatment, because depreciation rates are set by federal and state regulatory agencies.[92] Ameritech contends that depreciation rates are established in a way similar to separations rules, and since separations changes are exogenous, depreciation changes should be as well.[93] CBT maintains that the Commission prescribes the useful life of equipment for accounting purposes, and argues that depreciation should be exogenous until it is based on "economic life." CBT argues that depreciation costs are driven by forces outside the LECs' control, such as customer needs, competition, regulatory change, and new operating efficiencies. GTOC again argues that endogenous treatment of changes in depreciation rates is inconsistent with the Arizona Grocery decision because endogenous treatment penalizes a carrier for complying with regulatory mandates.[94] GTOC recommends either exogenous treatment of depreciation changes or allowing LECs more latitude in setting depreciation rates.[95]

---

decisions to deploy and retire equipment. However, the treatment of excess deferred taxes is governed by FASB. FASB has adopted standards that affect the treatment of excess deferred taxes resulting from the Tax Reform Act of 1986. These standards treat utilities differently than other businesses. FASB Statement No. 96.

91 LECs will complete their flow-throughs of excess tax reserves in a partial and sporadic fashion, depending on the remaining useful tax life of the property giving rise to the to the excess tax reserve. See Tax Reform Act of 1986, Pub. L. No. 99-514, Section 203(e)(2)(B), 100 Stat. 2146.

92 Ameritech Petition at 18-20; CBT Petition at 22-24; Ameritech Opposition at 23-24; Centel Opposition at 8-10; GTOC Opposition at 22-26.

93 Ameritech Petition at 18-20.

94 GTOC Opposition at 23-24, citing Arizona Grocery v. Atchinson, Topeka, & Santa Fe Railway Co., 284 U.S. 370 (1931) (Arizona Grocery).

95 GTOC Opposition at 25-26 (arguing that depreciation rate flexibility would be more consistent with the pricing flexibility granted under price caps, since it provides added ability to increase productivity). See also

74. The petitioners have not raised any new arguments that would cause us to reconsider our treatment of depreciation costs. Although the Commission prescribes depreciation rates, carriers still exercise control over their depreciation costs with their decisions to deploy or retire equipment.[96] As long as the service life of the plant is the major determinant of depreciation rates, treating a change in the depreciation rate as exogenous would give the LECs the power to influence their PCI levels, and would destroy the usefulness of the PCI as a benchmark.[97] Furthermore, GTOC misplaces its reliance on Arizona Grocery for reasons we explained in the LEC Price Cap Order, 5 FCC Rcd at 6845 n.203.

75. We also reject arguments that our decision to treat depreciation rate changes endogenously discourages the introduction of new services.[98] Price cap regulation provides strong incentives to introduce new services. First, new services are held outside of the price cap index for up to a year. LEC Price Cap Order, 5 FCC Rcd at 6825, para. 319. Second, cost savings resulting from the deployment of modernized facilities may yield earnings above the levels permitted under rate of return, which the carrier may retain subject to our sharing requirements. Finally, the formula we employ to cap common line rewards LECs that can generate demand growth. New services and offerings are one of the primary means of generating such growth.

5. Allocation of Exogenous Costs

76. Section 61.45(d)(4) of the Commission's Rules states that "[e]xogenous cost changes shall be apportioned on a cost-causative basis...." 47 CFR § 61.45(d)(4). AT&T states that exogenous cost adjustments for LECs should be allocated on a Part 69 basis, at least on an interim basis pending permanent allocation rules.[99] To do otherwise, AT&T states, will make review of LEC offerings more difficult. SWB and GTOC contend that AT&T has not

---

CBT Petition at 22-24 (advocating that we adopt an "economic life" standard to set depreciation rates). A change in the economic theory underlying our depreciation rate represcription process is beyond the scope of this proceeding. See LEC Price Cap Order, 5 FCC Rcd at 6809, para. 184.

96 Accord AT&T Opposition at 18-19; Ad Hoc Opposition at 16.

97 MCI Opposition at 30-31; Ad Hoc Opposition at 16; AT&T Opposition at 18-19.

98 See CBT Reply at 10.

99 AT&T Petition at 8-9.

provided a justification for its proposal, and that the allocation of exogenous costs on a Part 69 basis would limit movement away from current rates based on fully distributed cost pricing.[100] GTOC contends that allocation rules are not necessary, because any improper cost shifting or misallocation of exogenous costs would be discovered in ARMIS reports.[101] AT&T claims that misallocations would not be easily noticed in ARMIS reports unless the Commission establishes uniform rules for apportionment of exogenous costs.[102]

77. AT&T's argument, that diverse allocation methods will be employed by LECs, rendering meaningful review of those methods difficult, appears overstated. There are only a limited number of exogenous costs that may require allocation. In most cases the costs will clearly be attributable to a particular basket. For example, a separations change that affects central office equipment used to provide switched access will create an exogenous cost only for the traffic sensitive basket. In this example, we would be hard pressed to imagine a LEC argument that would convince us that the cost change should be allocated to common line. One of the fundamental purposes of price cap regulation is to move away from cost allocation systems imposed by regulators. LEC Price Cap Order, 5 FCC Rcd at 6791, paras. 34-35. For this reason, we decline to adopt AT&T's suggestion to require allocations of exogenous costs pursuant to Part 69.

6. Amortization

78. In the Further Notice in this proceeding, the Commission proposed to treat as exogenous the expiration of inside wire amortizations. Further Notice, 3 FCC Rcd at 3422-23, paras. 419-420. The Commission reasoned that, although the LECs were entitled to recover the amortized amounts from ratepayers, upon expiration of the inside wire amortizations, the costs should be removed from rates in recognition of the newly-deregulated status of inside wire. No further reference to inside wire amortizations is made in the discussions of exogenous costs in the Second Further Notice and the LEC Price Cap Order. In its reconsideration petition, MCI raises the issue of exogenous treatment of inside wire amortization.[103]

79. We find that inside wire amortizations should be treated exogenously. The Commission's historical regulatory treatment of inside wire,

---

100 SWB Opposition at 13-14; GTOC Opposition at 19-20.

101 GTOC Opposition at 21.

102 AT&T Reply at 7-9.

103 MCI Petition at 32; MCI Reply at 36-37.

permitting carriers to capitalize inside wire costs, and the subsequent decision to detariff inside wiring, resulted in the creation of amortizations to permit carriers to recover undepreciated capital costs.[104] Under rate of return regulation, amortization of inside wire would continue to decrease depreciation expense, thereby lowering the rate base, until the amortization was complete. That same effect can be obtained by treating inside wire amortizations as an exogenous cost under price caps. We believe that classifying inside wire amortizations as exogenous treats both LECs and ratepayers fairly -- the LECs because they are allowed to recoup their capitalized costs of inside wire, and ratepayers because our decision to change regulatory structures should not interfere with the promise of lower carrier costs upon the completion of the amortization.

80. MCI argues that LECs should be explicitly required to reduce their PCIs whenever any current reserve deficiency amortization or inside wire amortization is completed.[105] We stated in the LEC Price Cap Order that reserve depreciation amortizations generally will be treated as exogenous PCI reductions. LEC Price Cap Order, 5 FCC Rcd at 6808, para. 173. Upon reconsideration, we decide that amortizations ought to be reflected in annual price cap tariffs, effective July 1.

81. Generally, carriers may make exogenous adjustments to their price cap indices at the time the exogenous change occurs. However, in some cases, such as changes in Long Term Support or Transitional Support, Subscriber Plant Factor, and the Dial Equipment Minutes factor, we require LECs to make exogenous adjustments only on an annualized basis, at the time of the annual price cap filing. Section 61.45(d)(3) of the Commission's Rules, LEC Price Cap Order, Appendix B, 5 FCC Rcd at 6872. We found this was necessary to prevent excessive rate churn. LEC Price Cap Order, 5 FCC Rcd at 6808 n.173. We now decide to allow exogenous adjustments for reserve deficiency amortizations and inside wire amortizations only on an annualized basis, to avoid excessive rate churn.

82. The annualized exogenous treatment of reserve deficiency amortizations and inside wire amortizations that expire during the tariff year could result in a mismatch of revenues and expenses. This mismatch would occur because the revenue effect of the expiring amortizations would be spread

---

104 First Report and Order, CC Docket No. 79-105, 85 FCC 2d 818 (1981); Second Report and Order, CC Docket No. 79-105, 51 Fed. Reg. 8498 (Mar. 12, 1986); Reconsideration Order, 1 FCC Rcd 1190 (1986); Further Reconsideration Order, 3 FCC Rcd 1719 (1988); remanded sub nom. National Association of Regulatory Utility Commissioners v. FCC, 880 F.2d 422 (D.C. Cir. 1989); Second Further Notice of Proposed Rulemaking, 5 FCC Rcd 3407 (1990).

105 MCI Petition at 32; MCI Reply at 36-37.

uniformly throughout the year, whereas the related expenses would be recorded during that portion of the year covered by the amortizations. To avoid the mismatch between revenues and expenses, we are directing carriers to normalize the amortization by booking to Account 1439, Deferred Charges, the excess amortization expenses during the amortization period, and charging the deferred amount to expense over the remainder of the tariff year.

7. Other Exogenous Cost Issues

83. United contends that including the sharing amounts as an exogenous charge in the annual price cap filing allows inflation to distort the amount shared through the "w" term of the PCI formula.[106] United misunderstands the effect of the "w" term. Exogenous cost changes are costs currently incurred which will not continue into the future. Those costs are removed from the PCI, and the purpose of the "w" term in the PCI formula is to apply the inflation minus productivity adjustment only to those costs which will continue to occur. Because the amount of the sharing is a cost which will not continue into the next tariff year, that amount is properly excluded from the inflation minus productivity adjustment.

84. Pactel explains that Nevada Bell was required to leave the NECA common line pool when Pacific Bell left, and that Pacific Bell has been making transitional support payments to Nevada Bell since Pactel left the pool. Pactel argues that, since changes in NECA transitional support payments are exogenous, changes in these transitional transfers between Pacific Bell and Nevada Bell should be treated exogenously as well.[107] Ad Hoc asserts that the Long Term Support and the Transitional Support Funds were established to protect high cost companies from the effects of depooling the common line element, and that this rationale does not support intracompany transfers between Pactel subsidiaries.[108]

85. We agree with Pactel's contention that the payments from Pacific Bell to Nevada Bell further goals similar to those we identified when we created Transitional Support payments to ease the transition from pooled rates to a depooled environment. We will therefore allow Pactel to treat these support payments exogenously. In the 1989 Access Order, the Common Carrier Bureau examined Pacific's support payments to Nevada. The Bureau found that

---

106 United Petition at 5-6.

107 Pactel Petition at 7-10; Pactel Reply at 13. See also MCI Opposition at 32-33 (stating that it would not oppose exogenous treatment of these payments if the Commission approved them).

108 Ad Hoc Opposition at 19.

the effect of these payments on Pacific Bell's rates was minimal, and that they were "a reasonable means by which to alleviate the impact of the April 1, 1989, CL depooling."[109] These support payments are phasing down, and are scheduled to end in 1993.[110] As these two companies enter price cap regulation, Pacific's rates reflect in part the cost of the support payment made to Nevada. If this cost is not removed when the payment expires, Pacific's price caps and rates will remain at an inflated level. In addition, since price cap regulation was initiated for Nevada at a time when its rates were supported by these payments, Nevada's price caps and rates will be too low if exogenous treatment is not applied to the expiration of the payments. We believe that, unless exogenous treatment of these support payments is permitted, the overlay of price cap regulation on Pactel's transitional depooling mechanism will work an unexpected hardship on Pactel's ratepayers and shareholders. While we remain concerned about granting exogenous treatment to intracompany transfers, we believe the short-term, largely pre-determined nature of the payment, and our continued examination of it in the context of annual filings, will ensure that Pacific and Nevada will not be able to influence the level of their PCIs.

D. Sharing and Adjustment Mechanisms

86. In recognition of the difficulty of determining a single, industry-wide productivity offset that will be accurate for all LECs, the Commission adopted sharing and adjustment mechanisms to adjust rates in the event of unanticipated errors in the price cap formula. LEC Price Cap Order, 5 FCC Rcd at 6802, para. 120. The sharing obligation begins at 1 or 2 percent above the prescribed industry rate of return (depending on the productivity offset or amount of initial price decreases selected by the LEC); above that point the LEC shares half of its profits with customers. At either 5 or 6 percent above the prescribed rate of return, all profits would be returned to customers. Correspondingly, the Commission also established a mechanism for correction of unusually low earnings. The lower adjustment mark, at 1 percent below the prescribed rate of return, ensures that the price cap plan does not subject any LEC to such low earnings over a prolonged period that its opportunity to attract capital and ability to provide service are seriously impaired. Id. at 6801-02, paras. 126-127.

87. Most LECs raise no objection to our sharing and adjustment mechanism. Some, however, argue that the mechanism detracts from the benefits of a "pure" price cap plan by relying on rate of return principles. Others

---

109 Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638, 3685, para. 432 (Com.Car.Bur. 1989) (1989 Access Order).

110 On March 26, 1991, Pactel filed an ex parte document specifying two further payments.

contend that the lower adjustment mark, at 1 percent below the prescribed industry rate of return, is likely to result in confiscation. Some interexchange carriers and customers, in contrast, argue that the sharing plan does not go far enough -- that it should examine earnings in greater detail, for example. Some parties offer suggestions regarding details of the plan -- interest, direct payments -- that were, in their view, inadequately specified in the LEC Price Cap Order. Finally, several parties request clarification of the scope and application of the sharing and adjustment mechanism.

88. We noted in the LEC Price Cap Order that we sought to balance competing goals. Id., 5 FCC Rcd at 6801, para. 121. While we knew that a sharing mechanism might dampen the LECs' risks and rewards, and thus reduce the incentives offered by a "pure" price cap plan, we also recognized our obligation to assure that the price cap plan is consistent with the goals of the Communications Act, assuring just and reasonable rates and the continued availability of quality service. We believe that the modification of the price cap plan that we adopted in the LEC Price Cap Order successfully balances these considerations. We have designed the sharing and adjustment mechanisms to intrude as little as possible on the intended incentives and benefits of the price cap plan, while assuring that LEC rates remain just and reasonable. We grant the requests for clarification, and provide further discussion here on the points raised; but we find that no party has raised any arguments that are new or compelling, and we accordingly affirm the sharing and adjustment mechanism as adopted.

1. Total Interstate Earnings as Basis of Sharing

89. As it has done in previous stages of this proceeding, MCI argues that sharing should be based on per-basket earnings, rather than overall interstate earnings.[111] MCI asserts that a failure to base sharing on basket earnings will reward LECs for migration and cross-subsidy strategies, and that incentive regulation does not remove or diminish LECs' incentives to discriminate and cross-subsidize.[112] MCI states that per-basket sharing would not be a response to any notion of "overearning," but rather is necessary to guard against cross-subsidization by forcing each basket to stand on its own in terms of pricing and earnings.[113]

90. The LECs accept and endorse the Commission's conclusion that it would be inappropriate to require sharing on a per-basket basis because LEC

---

111 MCI Petition at 15; MCI Reply at 18-20.

112 MCI Petition at 15-16.

113 MCI Reply at 20.

productivity gains may vary per basket. MCI disputes this point, however, and states that the LECs are protected against anomalous impositions of sharing by the broad no-sharing zone.[114] Further, MCI urges, the PCI formulas adjust for factors such as productivity levels and demand growth on a basket level, so monitoring and sharing on a total company level cannot be justified on the basis of likely random earnings variations among the baskets. MCI argues that calculation of sharing by basket instead of overall interstate provides better assurance that earnings will be returned to those who paid the excessive rates that produced them. In any case, MCI asserts, productivity differences have already been reflected in the setting of rates under rate of return regulation.[115] MCI contends that, because the service baskets roughly track the Part 69 access service categories, the Commission's rationale in applying sharing on a total interstate basis should apply equally to rate of return earnings categories. Yet, MCI notes, the Commission requires monitoring and refunds, and prescribes earnings, by category.[116]

91. Several parties oppose MCI's arguments. The LECs generally support the Commission's determination that sharing should be based on overall earnings, not basket earnings.[117] Ameritech asserts that MCI's reliance on basket earnings is misplaced because the allocation of joint and common costs is arbitrary; the Commission has explicitly refused to determine a reasonable earnings level of price cap carriers; and there can be no "overearnings" in view of the operation of the sharing mechanism.[118] Bell Atlantic also opposes

---

114 MCI Petition at 17.

115 MCI Reply at 22-23.

116 MCI Petition at 17-18.

117 See, e.g., US West Opposition at 9 (noting that MCI's proposals have been considered and rejected before); USTA Opposition at 15 (arguing that the Commission is precluded from employing category earnings approaches since the remand of its rate of return rules). But see MCI Reply at 23-24 (arguing that the remand focused on the ability of carriers to earn their cost of capital under the automatic refund rule, and was not concerned with category earnings).

118 Ameritech Opposition at 14-15, citing the Represcription Order. Further, Ameritech contends, MCI's linkage of basket-level sharing and the prevention of discrimination and cross-subsidization is not valid. Discrimination focuses on the provision of like services at disparate prices, according to Ameritech, and comparisons among baskets would not show unlawful discrimination. Similarly, Ameritech asserts that the Commission has concluded that category returns, reflecting the results of a fully distributed cost methodology, do not provide economically meaningful results. Id., citing Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, 50 Fed.

MCI's arguments, because the productivity offset is based on the productivity of the interstate access market as a whole.[119]

92. Arguments in favor of a basket-by-basket sharing approach have been raised and addressed before. See LEC Price Cap Order, 5 FCC Rcd at 6805, para. 151. The price cap plan is designed to give LECs strong incentives to increase productivity and efficiency; this necessarily involves a greater degree of flexibility for LECs than they experienced under rate of return regulation. We also recognized, however, that while this system offers adequate protection to ratepayers as a group from excessive rates overall, a cap on aggregate prices could result in large price changes for some offerings. We thus adopted further ratepayer protections in the form of baskets, service categories, and pricing bands. Baskets, broad service groupings defined by the Part 69 access rules, have their own caps, offering further assurance of reasonable rates. The sharing mechanism, on the other hand, is created as a backstop to the plan as a whole, not to individual rates or even basket earnings levels. The plan stresses LEC overall productivity, and the sharing mechanism is keyed to that unified approach.

93. MCI asserts, for example, that productivity differences among the baskets have already been reflected in the initial rates, and therefore need not be taken into consideration further. Productivity adjustments, however, are ongoing, as are the effects of productivity differences, while the productivity offset and the incentives it is meant to engender are designed to operate on a total interstate basis. A failure to take these factors into consideration could result in rates that gradually and exponentially departed from their reasonable starting points. MCI's argument that because the Commission considers earnings, prescriptions, and refunds on a category or service level under rate of return regulation we should do so under price cap regulation fails to acknowledge the fundamental differences between the two regulatory approaches. MCI seems to assume that because vestiges of rate of return regulation remain within the price cap plan -- as, indeed, the Commission acknowledged they must, at least during the transitional phase -- rate of return regulation should be preserved intact, and applied in tandem with incentive regulation. We reject this assumption. The concern that after

---

Reg. 42,945, 42,948 (Oct. 23, 1985); Private Line Rate Structure and Volume Discount Practice, 97 FCC 2d 923 (1984).

119 MCI's approach, according to Bell Atlantic, could thus result in unfair sharing requirements. Bell Atlantic Opposition at 5-6; see also Pactel Opposition at 3-5; Ameritech Opposition at 15-16. US West contends that baskets and bands and other safeguards innate to price cap regulation will assure that cross-subsidization is inhibited. US West Opposition at 10. But see MCI Reply at 20-21 (Commission recognized that it needed to employ sharing as an additional backstop mechanism).

application of cap and banding limitations, and the requirement that sharing be on a cost-causative basis, LECs will still not only have incentives to, but also actually will, engage in cross-subsidization among competitive service in Basket A by charging unnecessarily high rates in Basket B, is at best speculative.

94. Most important, at least during the initial period of price caps preceding the fourth-year review, basket-by-basket sharing would impose rate of return procedures in a way that would undercut important goals of the price cap plan. We believe Ameritech is correct in pointing out that establishing basket-by-basket sharing necessarily requires the allocation of costs to each basket. It would be possible simply to continue existing cost allocations, but such allocations are inevitably imprecise and likely to inhibit the price cap plan's incentives for more efficient pricing. We are not persuaded that rate of return-based allocations would inhibit improper cross-subsidization more than they would inhibit desirable initiatives toward more efficient pricing. Accordingly, we affirm the determination of the LEC Price Cap Order that sharing will apply on an overall interstate rather than a per-basket basis.

2. Interexchange Services and the Sharing Mechanism

95. Several parties note that the Commission, in the LEC Price Cap Order, sometimes referred to "total interstate" and sometimes to "total interstate access."[120] Some of these parties argue that LEC interexchange service earnings should not be included in any calculation of total company earnings and sharing.[121] USTA contends that interexchange services of LECs have historically been treated separately, and differently, from access services.[122] Further, USTA asserts, interexchange services are excluded from the rate of return prescription process, and LECs have had no notice that the Commission might include them in this proceeding.[123] Ameritech argues that subjecting LECs' interexchange services to the sharing mechanism when AT&T's comparable services are not subject to sharing would be fundamentally unfair.[124]

---

120 See, e.g., Ameritech Petition at 12-13, citing LEC Price Cap Order, 5 FCC Rcd at 6805, para. 151; 6833, paras. 376, 380 ("total interstate") and Appendix B, Section 65.600(d) ("total interstate access").

121 See, e.g., MCI Petition at 20; USTA Petition at 13-14.

122 USTA Petition at 13-14.

123 USTA Petition at 14. See also Ameritech Petition at 12-13; Ameritech Reply at 9-10.

124 Ameritech Reply at 10.

96. MCI, which also asserts that interexchange services are provided on a competitive basis, states that sharing based on total interstate earnings would pose unique cross-subsidy questions which could skew any total company earnings results and sharing.[125]

97. We affirm that sharing will consider total interstate earnings, including interexchange, and we modify Section 65.600(d) of our rules consistent with this judgment.[126] While it is true that the LECs' interstate interexchange services may face some competition, the LECs were designated in the Optional Calling Plan Order as dominant providers of this service.[127] We note also that a significant part of the interexchange basket consists of services that are not corridor services and are not necessarily competitive, such as packet switching. Further, we believe that exclusion of interexchange services from the sharing mechanism would substantially increase the possibility, if not the likelihood, of cross-subsidization. The sharing mechanism is designed to consider a LEC's total earnings and total productivity, and to exclude interexchange would compromise the usefulness and integrity of that plan and reduce the benefits of the plan to consumers. We believe that the placement of interexchange service in a separate basket offers adequate protection against the evils suggested by the pleadings here. We will accordingly amend our rules to reflect this clarification.[128]

3. Excluded Services and Sharing

98. In the LEC Price Cap Order we determined that sharing obligations would be determined using total interstate earnings. We also stated that some specified services would be excluded from the price cap plan. Id., 5 FCC Rcd at 6810, paras. 191-197. Two carriers argue that these pronouncements create a discrepancy, and question whether services excluded from the price

---

125 MCI Petition at 20-24. This situation is exacerbated, according to MCI, because interexchange carriers are captive ratepayers of LEC monopoly services as well as competitors for LEC interexchange services.

126 Rule modifications are presented in Appendix B. "Total interstate" for purposes of sharing calculations will not, of course, include non-regulated or detariffed services, such as billing and collection. Excluded services are also excluded from sharing calculations, as discussed below.

127 Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, CC Docket No. 84-1235, FCC 85-540. 50 Fed. Reg. 42,945 (Oct. 23, 1985), recon. 50 Fed. Reg. 50,842 (Dec. 12, 1985).

128 Accord AT&T Petition at 15-16.

cap plan are nonetheless included in the total interstate earnings figure upon which sharing is based. Pactel observes that sharing obligations and ARMIS reporting requirements are made on a total interstate basis, and concludes that earnings on services excluded from price cap regulation are included in calculating sharing obligations.[129] MCI, joined by several LECs, claims that services excluded from price cap regulation are also excluded from sharing obligations.[130]

99. The LEC Price Cap Order requires price cap LECs to report all revenues from excluded services on an aggregated basis. We found that this precaution, in addition to those in the tariff review process and the complaint process, was sufficient to ensure just, reasonable, and nondiscriminatory rates for services excluded from price caps. LEC Price Cap Order, 5 FCC Rcd at 6810, para. 197. Based upon our review of the pleadings submitted on reconsideration, we decide that earnings from services excluded from price cap regulation should not be incorporated in the earnings calculations that are the basis of LEC sharing obligations. While services excluded from price cap regulation constitute a very small part of a LEC's overall revenues, and cross-subsidization concerns are therefore minimized, we have stated that those services would continue to be regulated under conventional tariff review processes. LEC Price Cap Order, 5 FCC Rcd at 6810, para. 196 n.224. These "conventional" processes should not include the price cap sharing mechanism. Revenues from excluded services should therefore be excluded from price cap regulation's "total interstate" revenue figures. We believe that their costs should likewise be excluded from the earnings calculations in the sharing mechanism.

4. Interest

100. The LEC Price Cap Order concluded that adjustments of LEC PCIs to share high earnings with their customers should include an interest component. LEC Price Cap Order, 5 FCC Rcd at 6801, para. 124. While many parties support this determination, the LECs generally oppose interest payments. Supporting parties, including interexchange carriers and large users, urge that the Commission's requirements regarding the precise calculation of amounts to be shared by means of price cap adjustments be clarified to note the level at which interest should be included.[131]

---

129 Pactel Opposition at 21-22. Accord AT&T Petition at 15-16.

130 MCI Reply at 42-44; BellSouth Reply at 12-13; SWB Petition at 13-15; SWB Reply at 8.

131 See, e.g., MCI Petition at 22 (arguing for interest at the LEC's actual earnings level); accord ICA Opposition at 4; AT&T Petition at 6-7 (arguing that interest must be at a level no lower than the prescribed rate of return).

101. The LECs argue against the inclusion of interest, asserting that the Commission did not provide adequate notice that an interest component might be included, and that the assignment of interest is inappropriate in a price cap regime.[132] USTA argues that the imposition of interest constitutes an unwarranted increase of the Consumer Productivity Dividend.[133] US West contends that imposing interest implies that the rate is somehow unlawful, when, in reality, even rates that earn at levels triggering 100 percent sharing are still presumed lawful.[134] Two LECs urge that sharing is entirely prospective, rather than indicating a refund liability.[135] US West avers that the consumer share is neither a refund nor a penalty; it is an additional benefit associated with extraordinary LEC productivity gains.[136] Contel argues that a prospective sharing of increased productivity is consistent with the Commission's goals, while the addition of a retrospective interest component serves to penalize the LEC for achieving greater productivity.[137] USTA contends that imposing interest on sharing creates a disincentive for exchange carriers to increase productivity.[138]

102. Although some LECs argue against the imposition of interest in the sharing mechanism, we believe that the inclusion of interest is a fairer reflection of the equities and creates a more effective price cap plan.[139]

---

132 US West Opposition at 8. BellSouth Petition at 14-15, 17; Pactel Petition at 10-11; NYNEX Petition at 3-4. Several parties note that the imposition of interest was mentioned only once, in the text of the Order, and was not included in the rules adopted with that Order. See, e.g., BellSouth Petition at 14-15. But see MCI Opposition at 12-14 (arguing that LECs have had ample opportunity for comment).

133 USTA Petition at 8; accord SWB Petition at 9.

134 US West Petition at 12.

135 Contel Petition at 7, citing LEC Price Cap Order, 5 FCC Rcd at 6801, para. 121; Rochester Opposition at 13-15.

136 US West Petition at 11.

137 Contel Petition at 7-8; see also USTA Petition at 7; US West Petition at 11-13; Pactel Petition at 12-13; NYNEX Petition at 4-5; GTOC Opposition at 13; SWB Opposition at 8.

138 USTA Petition at 7-8.

139 With regard to LEC arguments of inadequate notice that interest would be included in sharing adjustments, we believe that substantial opportunity for comment has been provided. The Supplemental Notice introduced the sharing

The LECs are correct in asserting that the sharing adjustment does not imply any unlawfulness, and does not constitute a "penalty." In fact, the sharing mechanism is designed to correct any inequities in the application of the price cap plan to particular LECs, in order to ensure that the benefits of price caps are fairly distributed. But it is also true that interest properly recognizes the true value of the delay in the recognition of those benefits.[140] Sharing obligations arise when LEC earnings exceed the boundary of the no sharing zone; high earnings may be due to an error in the productivity offset for that LEC, to a substantial increase in efficiency and productivity by the LEC, to a change in market conditions, or to a number of other factors. Whatever their cause, the application of the price cap plan to that LEC is to be corrected, and the high earnings are to be shared with the LEC's customers. While the sharing will be accomplished through use of a prospective adjustment, the extent of the sharing obligation is calculated on prior period earnings, and is not merely an assumption about the LEC's productivity going forward. The interest calculation is meant simply to ensure that each party receives its proper share of the benefits of price caps, taking into proper account the date on which each receives these benefits.[141] Rather than considering interest payment as a disincentive to achieve high productivity, we see the interest component as adding to the LECs' incentive to calculate the lowest possible rates for users.[142]

---

mechanism generally, and devoted several pages to developing the breadth and depth of the Commission's considerations in that regard, including soliciting comments on the components of any sharing arrangement. Supplemental Notice, 5 FCC Rcd at 2252-57. That Notice also invited parties to submit comments in the Represcription Proceeding, CC Docket No. 89-624, regarding the earnings levels and amounts to be shared. Id. at 2257-59. We believe the imposition of interest is a logical outgrowth of the Notice.

140 AT&T Opposition at 9-10; MCI Opposition at 12-14; Allnet Reply at 1; Ad Hoc Opposition at 7; ICA Opposition at 4. AT&T argues that, absent interest, the LEC that experiences the increase in profits also reaps the full rewards of that increase, its own share as well as the customers' share, and that customers should be paid interest because they do not receive their share of the benefit until the following year. AT&T Opposition at 11.

141 Thus, the application of interest does not imply a penalty associated with unlawful earnings. Accord MCI Opposition at 12; AT&T Petition at 17-18.

142 We do not find persuasive the arguments of some LECs that the interest obligation should be removed from the sharing mechanism because no other exogenous adjustment to PCI levels includes an interest calculation. Pactel Petition at 14; Ameritech Opposition at 13. In general, exogenous cost changes are reflected in the PCI at the time they occur. LEC Price Cap Order, 5 FCC Rcd at 6807, para. 168. In a few cases, we have ordered annualized treatment of exogenous changes in order to avoid rate churn. Annualized

103. In addition to the policy issues raised in the record concerning interest payments, two LECs argue that the imposition of interest is outside this Commission's legal authority. US West contends that the Commission is statutorily empowered to grant interest only when we order refunds.[143] BellSouth asserts that the price cap sharing mechanism is not susceptible to interest requirements, since it is designed to share prospective productivity, not prior period earnings.[144]

104. We adopted the sharing mechanism, including the interest obligation, pursuant to Sections 4(i), 201-203, and 205 of the Communications Act. Nothing in those provisions forbids the assessment of interest. US West's argument that this prohibition should be inferred from Section 204(a) is logically fallacious and refuted by precedent. Section 204(a) requires interest when a rate is investigated and found not justified. But the Act provides no basis for concluding that Congress intended to forbid interest in other situations.[145] In New England Telephone, in fact, the court affirmed a Commission decision to order refunds with interest to enforce a rate of return prescription.[146] We accordingly reject US West's argument that we have exceeded the authority of Section 204(a) of the Act.

---

treatment results in a PCI effect prior to the actual cost change. The sharing obligation, which stems from year-end earnings that take some months to finalize, stands out as an exogenous adjustment that occurs well after the actual obligation arises.

143 US West Petition at 12-13, citing 47 U.S.C. § 204(a). US West argues that the imposition of interest is especially unfair and illogical if the LEC is already pricing below its PCI. See also Pactel Petition at 11-15 (arguing that if the Commission does retain the imposition of interest on sharing adjustments, we must at least clarify that sharing does not constitute a refund of overearnings).

144 BellSouth Opposition at 13-14. BellSouth asserts that the inclusion of interest subjects the entire sharing mechanism to appeal, since it is unsupported by any legal or economic rationale. Further, according to BellSouth, if the Commission assesses interest, we can do so only through characterizing the shared amount as a refund -- in which case we will have difficulty justifying our ordering a LEC to pay half a refund, thus again subjecting the sharing mechanism to legal challenge. BellSouth Reply at 14.

145 Accord AT&T Opposition at 12 (arguing that Section 204(a) is inapplicable).

146 New England Telephone v. F.C.C., 826 F.2d 1101 (D.C.Cir. 1987).

105. We also reject the argument that we cannot include interest unless we characterize the sharing adjustment as a refund of overearnings.[147] BellSouth has offered no support for its assertion that we are precluded from assigning interest except in the case of a refund, and we do not accept this argument. The Act confers considerable discretion in this matter, and the exercise of that discretion here, in the imposition of interest on sharing amounts in order to assure that the benefits of a new regulatory regime are fairly distributed, is well within our legal authority.

5. Calculation Issues

106. Other parties raise technical issues concerning interest payments and sharing that require clarification. United argues that the imposition of interest implies that the amount to be returned to customers is a finite dollar amount. United notes that since sharing is accomplished via a prospective PCI adjustment, the amount shared, as well as the amount of interest, is a function of demand. Thus, United argues, the actual amount shared (and interest paid) could be more or less than the sharing obligation.[148] Sharing is calculated on past-year earnings, and is therefore precisely quantifiable. While United is theoretically correct that, in effecting sharing through a prospective adjustment, a LEC may pay more or less than the actual calculated amount, depending on prospective demand in the year following the adjustment, this fact does not change the calculation of the sharing amount itself. Interest will be calculated based on the amount to be shared and the period of time that elapses between when the amount was earned and when it is paid. We do not believe that any true-up procedure is necessary to ensure that the exact amounts calculated on a historical basis flow through on a prospective basis. Interstate demand (including interstate access demand) continues to grow, and our price cap plan contains strong incentives for LECs to increase demand at an increased pace. We are therefore not concerned that significant shortfalls will occur with respect to sharing obligations.

107. MCI states that interest should be measured from the day after the end of the period for which the adjustment is made, to the midpoint of the period during which the sharing adjustment will be in effect, to recognize that amounts being "refunded" are fungible with other sources of capital on which the LEC earned its effective rate.[149] MCI also contends that

---

147 Accord AT&T Opposition at 12; Ad Hoc Opposition at 8.

148 United Petition at 4. But see BellSouth Opposition at 15 (arguing that since sharing is intended as a means of sharing prospective productivity gains, and not a refund mechanism, United's concern is not on point).

149 MCI Petition at 22.

adjustments made for sharing purposes should be derived by adjusting upwards the earnings triggering the sharing, by the appropriate local, state, federal, and other taxes, so that the amount to be shared will reflect the LEC's tax reduction benefit from the sharing.[150] MCI states that without such adjustments, the tax effects will never be properly reflected, since sharing is determined on net income after taxes. Allowing the LEC to keep the amount of tax it originally collected from ratepayers, MCI asserts, would be patently unreasonable.[151]

108. AT&T asserts that the interest paid must be at least at the LECs' prescribed rate of return, or it could constitute a below-market source of capital for LECs.[152] MCI, however, insists that interest be paid at the level of the LEC's earnings for the year, since that represents the actual benefit derived by the LEC.[153] US West, while opposing the imposition of interest, states that if the Commission does in fact require interest on shared amounts, the level of interest should be no higher than the LECs' authorized rate of return.[154]

109. MCI also urges that, in order that the customer may derive actual benefit from any sharing obligation, the LEC must adjust its API as well as its PCI, even if the API is already less than the PCI.[155] MCI says it is necessary to maintain the same total dollar differential between the API and PCI, in order for ratepayers to receive the full benefit of the sharing adjustment.[156]

110. We will resolve matters concerning the implementation of sharing in the same frame of reference we used to develop the mechanism itself -- the balancing of consumer interests and LEC incentives, and the desire to ensure that each receives or retains its proper share of productivity gains achieved through the operation of the price cap plan. To that end, we adopt MCI's

---

150 MCI Petition at 22-23.

151 MCI Reply at 27. But see US West Opposition at 8 (the tax effects will be compensated for in the year in which sharing occurs).

152 AT&T Petition at 7-8; accord Allnet Reply at 1-2; US West Opposition at 8.

153 MCI Reply at 27.

154 US West Opposition at 8.

155 MCI Petition at 23.

156 MCI Reply at 28-29.

timing proposal, under which interest amounts will be calculated from the day after the end of the period giving rise to the adjustment, to the midpoint of the period when the adjustment is in effect. Regarding the "grossing up" of earnings triggering sharing, to reflect relevant state, local, and federal taxes, we will direct that such adjustments be made, consistent with our policy under rate of return regulation, in order to reflect the actual earnings amounts to be shared. Similarly, the rate at which interest is calculated must not penalize or disadvantage the LEC, which has accepted and exceeded a challenging productivity offset through increasing its efforts and efficiency. Likewise, though, the customer must receive its fair share of these productivity gains, and must not be required to provide a below-market rate loan to the LEC. Based on these considerations, we conclude that interest should be calculated at the level of the prescribed rate of return calculated in our Represcription Order.

111. Finally, we reject MCI's assertion that sharing must be effected by an adjustment to the API as well as an adjustment to the PCI. The sharing mechanism we devised takes the form of a one-time reduction in the PCI for the next rate period, to be calculated like other exogenous changes. We remain convinced that such a PCI adjustment will bring the benefits of the sharing mechanism to ratepayers in an accurate, equitable, and reasonably prompt manner.[157] We believe that an API adjustment would stifle the incentives we are trying to create, by providing a disincentive for LECs to exercise downward pricing flexibility created by the price cap system. We therefore agree with LEC petitioners that an API adjustment would detract from the operation of the price cap plan.[158]

112. MCI argues that the Commission must clarify the manner in which sharing adjustments are allocated among baskets. MCI notes that Section 61.45(d)(4) states that exogenous cost changes (including sharing adjustments) are to be apportioned on a cost-causative basis between price cap services and all others, and among the price cap baskets.[159] MCI contends that such apportionment must be based on the contribution of each basket, and the respective banded service categories, to the earnings to be shared.[160]

---

157 To the extent that delay is a factor, we believe that the calculation and payment of interest address this concern.

158 Ameritech Opposition at 12-13; USTA Opposition at 16; Pactel Opposition at 17; BellSouth Opposition at 14.

159 MCI Petition at 23; see also Ad Hoc Petition at 18-20 (stating that excess earnings and exogenous costs should likewise be allocated among service categories within service baskets).

160 MCI Petition at 23-24; see also Ad Hoc Opposition at 24-25; ICA Petition at 10-11; Ad Hoc Reply at 9.

BellSouth opposes this request, noting that the rules require that these adjustments, like all exogenous adjustments, be flowed through on a cost-causative basis, and that nothing more is required.[161]

113. We do not believe that any Commission action is required at this time. Our rules require that sharing adjustments, like all exogenous adjustments, be flowed through on a cost-causative basis. The rule language is identical to that included in the AT&T price cap plan, and we have no reason to believe that this language is inadequate. We therefore find no present need to specify a particular method of reflecting "cost causation."

114. MCI also asserts that the Commission must address the treatment of post-period accounting adjustments, since the current rule in Section 65.600(d) creates loopholes that a LEC can exploit through treatment of accrued expenses that are later reversed, and through making other accounting corrections after the three-month reporting deadline. MCI argues that nothing in the present rule indicates that such earnings calculations will ever be corrected, so the LEC's sharing obligation will never reflect the adjusted earnings amounts. MCI suggests that Section 65.600(d) be modified to require a corrected earnings report to be filed on September 30 of the year following the year for which earnings are being reported; this report would include corrections to reflect the reversal of accrued costs and other adjustments since the original report.[162]

115. We agree that MCI's concern about post-period earnings adjustments is valid. LECs have repeatedly asserted that they are not in a position to finalize earnings reports within one or even two quarters after the books close, and post-period adjustments are therefore inevitable. These adjustments should be reflected in the LECs' sharing obligations. But we are concerned that a separate filing by price cap LECs each September to make final adjustments to reported earnings would add significantly to the administrative burden of the price cap program, and could also produce rate churn. Furthermore, a nine-month "clearing" period does not assure a truly final calculation of earnings. LECs have argued in some cases that adjustments were needed well into the next year. In order to allow for post-period adjustments with a minimum of burden and a minimum of rate churn, we direct LECs to submit in each year's annual filings whatever corrections or modifications may be necessary to their previous year's accounts. We modify Section 65.600(d) to reflect this change.

---

161 BellSouth Opposition at 16; see also USTA Opposition at 15.

162 MCI Petition at 21; MCI Reply at 29-30.

6. The Lower Adjustment Mark

116. No pleadings challenge our determination to establish a lower adjustment mark for price cap LECs, and all but two parties in this proceeding are satisfied with the Commission's balancing of risks and rewards in the price cap plan, as expressed by our establishing a lower adjustment mark symmetrical with the top of the no sharing zone. Two petitioners, however, argue that the 10.25 percent lower adjustment mark should be changed on reconsideration. GTOC and CBT assert that the Commission offers no support for the selection of a level a full percentage point below the minimum rate of return or cost of capital.[163] CBT rejects the notion that this "penalty" balances the possible rewards; it asserts that the lower adjustment mark effectively lowers the recoverable cost of capital for price cap LECs a full percentage point, and states that such discrimination is unjustified and unsupported by the Commission's own findings.[164] In view of the unlikelihood that any LEC would choose to be less efficient under price caps, CBT argues, the Commission should set the lower formula adjustment mark at, not below, the cost of capital.[165]

117. We again reject those arguments, made in previous stages of this proceeding, that any lower adjustment mark must be set no lower than the prescribed rate of return. See LEC Price Cap Order, 5 FCC Rcd at 6806-07, para. 164. The essence of the price cap plan is a balance of risks and rewards. A guarantee of earnings at the full level of the prescribed rate of return eliminates genuine risk and is thus overly favorable to LECs and inimical to this approach. LECs request that the plan accord them an assurance that their earnings will not slip below the prescribed rate of

---

163 GTOC Petition at 18-20; GTOC Opposition at 11; CBT Petition at 18-19. CBT contends that LECs would be doubly disadvantaged; not only would they have no opportunity to recoup lost earnings represented by the difference between the prescribed rate of return and the lower adjustment mark, but they would begin the next year under price caps with depressed indices. This, in spite of the Commission's acknowledgement that "low earnings may be attributable to an error in the productivity factor, the application of an industry-wide factor to a particular LEC, or unforeseen circumstances in a particular area of the country," is unfair, according to CBT, and is likely to lead to the sort of prolonged underearnings which may render a LEC unable to provide new services or even maintain existing levels of service.

164 CBT Reply at 3-5. But see AT&T Opposition at 17-19 (the lower adjustment mechanism is not intended to recoup past shortfalls, but to ensure that earnings are sufficient on a prospective basis to raise adequate capital).

165 CBT Petition at 20.

return, forgetting that this earnings level is a target, not a certainty, even under rate of return regulation. The plan gives LECs flexibility and the right to retain more of their earnings; it balances these opportunities against the possibility that LECs might earn less if they fail to respond to the incentives provided. LECs are reasonably expected to become more efficient in order to earn higher profits, or even to maintain their current profits. Both ends of the scale are necessary to the validation of the incentives. LECs can control costs and become more efficient. If the formula applies harmfully to any particular LEC, the lower adjustment mechanism offers a remedy, while still providing an incentive to become more profitable by increasing efficiency, not rates. We note also that LECs are always free to file a rate increase upon a showing that it is necessary to prevent a confiscatory outcome.[166]

118. Moreover, our decision in the Represcription Order makes clear that we do not view the 11.25 percent as a "minimum" rate of return.[167] Thus, selection of a lower adjustment mark below the 11.25 level does not equate to the selection of a confiscatory adjustment mechanism.

7. Refunds from Rate of Return Regulation

119. In the LEC Price Cap Order, we adopted new Section 65.703(h) of the rules, setting forth methodologies to adjust LECs' price cap indices to effect refunds calculated under rate of return regulation, based on earnings in the final rate of return period. On reconsideration, however, we believe that the question of refunds of pre-price cap regulation obligations need not be decided in this proceeding.

120. We note that virtually all parties that address the issue urge that the refund rule adopted in the LEC Price Cap Order be eliminated.[168] On

---

166 We agree with AT&T that PCI adjustments to bring a LEC's earnings up to the lower adjustment mark will be one-year adjustments. AT&T Petition at 8 n.*. This is in keeping with the one-year adjustments made to effect sharing. In response to USTA's argument that the upward adjustment should not be deleted from the PCI, we note that if a LEC continues to operate below the lower adjustment mark, the LEC will be subject to a subsequent PCI adjustment. See USTA Opposition at 17.

167 Accord AT&T Opposition at 16-17; MCI Opposition at 19-20; Ad Hoc Opposition at 14.

168 BellSouth Petition at 17-19, MCI Petition at 25-26; SWB Opposition at 10-11; US West Petition at 5-6; Pactel Petition at 20-24; CBT Petition at 16; GTOC Opposition at 9-10. See also MCI Reply at 32-33 (stating that the LECs want the rule eliminated for the wrong reasons, but that it should, in fact, be eliminated).

reconsideration, we find that consideration of methodologies for any refunds based on overearning in the final period of rate of return is not yet ripe for consideration. It will be some months yet before earnings data is accurately recorded and can be evaluated. If, at that time, it appears that any carriers have overearned during the 1989-1990 monitoring period, we will revisit the issue of how to reflect such overearnings and refunds. In the meantime, we have no need for regulations establishing methodologies for refunding such overearnings, and Section 65.703(h) is accordingly removed from our Rules.

8. January - June 1991 Earnings

121. MCI proposes that rate of return requirements apply to earnings in the first half of 1991, and that price cap regulations apply only after the July 1, 1991 effective date of the annual filing.[169] In our view, MCI has raised a specious issue. January to June 1991 is the first half year of price cap regulation, and thus part of the 1991 base year upon which sharing adjustments may be triggered for rates effective July 1, 1992. The fact that these rates will result in adjustments in July 1992 is an integral part of the price cap plan, and is based on our determination that PCI adjustments would reflect the previous year's earnings. See LEC Price Cap Order, 5 FCC Rcd at 6805, para. 152.

---

169 MCI Petition at 23, 29-30; MCI Reply at 33-35. MCI states that LEC earnings for the first six months of 1991 must thus continue to be monitored on a category rate of return basis, and that refunds (through price cap adjustments) must be awarded based on the full amount of LEC service category earnings above the prescribed rate of return of 11.25 percent.

III. PRICE CAP TARIFF FILINGS

A. New Services

122. The LEC Price Cap Order defines new services as those that expand customers' range of options. LEC Price Cap Order, 5 FCC Rcd at 6824, para. 314. We explained that new services need not incorporate the use of new technology or functionality. Under our definition, an offering that is simply a re-priced version of an existing service or an added option to an existing service will be treated as "new." In addition, the absence of historical demand information associated with these new offerings requires us to exclude new services from price indices when the services are first introduced. We decided, as we had done with AT&T, to fold new services into the cap at the first annual price cap filing following a base year in which the new service had been offered, a period of between 6 and 18 months, depending upon the timing of the introduction of the new service. LEC Price Cap Order, 5 FCC Rcd at 6825, paras. 319-321.

123. Carriers were directed initially to support each new service tariff with a demonstration that the offering will yield positive net revenue, measured on a present value basis, within the lesser of a 24-month period after an annual price cap tariff that includes the new service takes effect, or 36 months from the date the new service becomes effective.[170] With respect to pending rulemakings and other proceedings that affect the prescribed switched access structure, such as the proposed revisions to Part 69 to accommodate Open Network Architecture, we decided to consider modifications to our new services filing requirements as part of those separate proceedings as the needs of those proceedings dictate. LEC Price Cap Order, 5 FCC Rcd at 6835, para. 395.

124. MCI challenges our decision to employ only the net revenue test for new services, a test which MCI argues fails to address monopoly pricing issues presented by LEC offerings. While MCI does not seek to disturb the net revenue test as a check on predatory pricing by LECs that face competition, MCI recommends that the Commission apply a price ceiling to new services by requiring that the services be targeted to earn no more than the authorized rate of return that is applicable for rate of return carriers.[171] MCI argues

---

170 Section 61.49(g) of the Commission's Rules, 47 C.F.R. § 61.49(g). We directed that such filings be made on 45 days' notice. We also directed LECs to file quarterly reports that compare actual operating results with projections, beginning six months after the new service is introduced.

171 MCI Petition at 36-38; MCI Reply at 47-48.

that monopoly profits earned on new services could be used to cross-subsidize predatory pricing levels for competitive new services. MCI further argues that LECs could simply introduce re-priced versions of capped offerings, but charge a higher price to evade price cap limits.

125. LECs respond that since new offerings will largely be re-priced versions of existing services, LECs are subject to real upward pricing constraints. According to the LECs, as long as customers are free to choose the lowest priced services, LEC attempts to charge high prices for new offerings will be defeated.[172] LECs also argue that the other requirements the Commission has placed on new services filings, particularly the quarterly reporting requirements, ensure that prices of new services will be reasonable.[173] In addition, LECs argue that pricing flexibility for new services is consistent with the Commission's desire to encourage new and innovative offerings.[174]

126. The parties commenting on this issue subscribe to opposite theories of the extent to which a capped substitute for a new service can affect prices of the new offering. MCI argues that new service pricing can never be constrained by the existence of a substitute service subject to cap and band requirements, while the LECs argue that substitute services will constrain the prices for new services in most cases, and if no substitute exists, LECs should be rewarded for innovative new offerings. Upon reconsideration, we believe it best to defer final determination of this matter to the Part 69 ONA proceeding.[175] We will accordingly adopt none of the proposed approaches, nor will we implement solely the floor-only approach set forth in the LEC Price Cap Order. Instead, we will, for the interim, supplement the net revenue "floor" with the retention of our traditional new services tariff review support. This is a cautious, interim approach to new services pricing that will protect ratepayers from unreasonably high rates, while ensuring that LECs have some pricing flexibility for their new offerings. We will

---

172 USTA Opposition at 22; BellSouth Opposition at 19; Pactel Opposition at 19.

173 NYNEX Opposition at 14; BellSouth Opposition at 19; USTA Opposition at 22; SWB Opposition at 12-13.

174 USTA Opposition at 21-22; BellSouth Opposition at 18-19; Pactel Opposition at 18-19.

175 Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rulemaking, CC Docket No. 89-79, 4 FCC Rcd 3983 (1989) (Part 69 ONA Notice). We accordingly incorporate the record on new services here into the record in that proceeding.

return to the issue of new service pricing in our Part 69 ONA proceeding. We are reexamining our access rules in that proceeding, one of whose goals is to accommodate the new and restructured access offerings that will implement Open Network Architecture.

127. The interim approach we have designed continues in place all of the net revenue requirements established by the LEC Price Cap Order. In an environment in which LECs face emerging competition for access service, the net revenue showing is a useful mechanism to guard against predatory pricing. Thus, the rates price cap LECs file for new services must continue to demonstrate that incremental revenue exceeds incremental cost.

128. In addition to demonstrating that the new service generates net revenue, we will require, on an interim basis, that LECs support new services with a traditional cost showing. LECs that have introduced new offerings in the past have provided cost support identifying the direct costs of the new service as well as associated overheads. LECs typically submit engineering studies, time and wage studies, or other cost accounting studies in support of the new offering. The purpose of these studies is to identify the direct costs of providing the new service, absent overheads. Once direct costs are identified, the LECs add overhead costs in order to determine the overall cost of the new service.[176] We will continue to accept such studies, pending the development of other rules, for purposes of determining whether new service rates may be excessive.

129. Having deferred to the Part 69 ONA proceeding the development of new services pricing guidelines, we also recognize the need to use in the meantime a review process for new services that will balance the need to protect ratepayers from unreasonably high rates with the benefits of pricing flexibility for these offerings. We believe that, as an interim solution, our decision to continue to use our pre-price caps approach pending completion of the Part 69 proceeding is reasonable. We conclude that, in the short term, neither carriers nor customers will be harmed by this interim approach.[177]

---

176 For instance, the LEC may multiply the direct cost by an overhead loading factor that adds the cost of various overheads or other reconciliation amounts to the cost of the service. The overhead loading factors are typically derived from ratios of overhead costs to direct costs for a similar service, and may be documented by reference to ARMIS data. The LEC may also derive overhead costs by application of a computerized cost allocation model.

177 We reject MCI's suggestion to reduce the PCI whenever a LEC offers a new service in recognition that the new service is priced to recover some overhead costs that no longer need to be recovered from capped offerings. See MCI Petition at 37-38. The productivity offset considers and includes changes in overhead costs under caps, so to adjust the PCI to reflect them would constitute double-counting.

130. In addition to concerns about the cost support requirements for new services, reconsideration petitions raise concerns about rate structure flexibility under price cap regulation. As adopted, the price cap system maintains the requirement, developed under rate of return regulation, to maintain a standardized approach to the structure of switched access. Thus, as under rate of return, carriers seeking to deviate from the Part 69 rate structure must file petitions to waive our rules, prior to implementing any structural plans that are different from Part 69 requirements.[178] SWB argues that Part 69 waivers should not be required because such waivers must be supported with detailed cost allocation information that price cap regulation seeks to eliminate.[179]

131. We have not imposed any particular requirements for Part 69 waivers. We will continue to require carriers to demonstrate that any restructuring of access elements that is not consistent with the Part 69 rules is consistent with the purposes of the access charge rules. We will, of course, examine revisions of those rules in the pending Part 69 ONA rulemaking.

132. CBT raises a different issue with respect to new services. CBT argues that small and mid-sized LECs should be given a longer "payback" period than the largest carriers to generate net revenues for their new services offerings.[180] As adopted, the payback period for new services is the lesser of 24 months from the time the filing is first folded into the price indices or 36 months from the date the filing was first introduced. We believe that we should affirm our existing rule, absent a more specific showing regarding any inability of mid-sized and smaller companies to generate net revenue in that period of time.[181]

---

178 Part 69 does not similarly prescribe a special access rate structure. Rate structure changes for special access services can therefore be implemented in the tariff review process.

179 SWB Petition at 23-25.

180 CBT Petition at 21-22.

181 See MCI Opposition at 45-47.

B. Within-band, Below-cap Filings

133. In the LEC Price Cap Order, we determined that below-cap, within-band tariff filings should have "streamlined review." This allows LECs to file tariffs on 14 days' notice. These filings are also presumed lawful. LEC Price Cap Order, 5 FCC Rcd at 6822, paras. 290-291. MCI contends that streamlined treatment for below-cap, within-band filings is not justified, because the price cap rules do not adequately protect against discrimination or rate churn.[182] As an example, MCI contends that abrupt increases in nonrecurring charges could have a disproportionate impact on small interexchange carriers, and therefore could adversely affect competition among interexchange carriers. MCI contends that a longer review period is necessary to prevent this, and that streamlined review should be applied only to competitive services offered by nondominant carriers.[183]

134. The price cap plan is carefully designed to encourage efficiency and productivity gains, as well as lower rates. It contains safeguards that protect both LEC interests and ratepayer interests. This carefully designed system with its built-in safeguards fully justifies our decision to presume that complying rate changes are lawful, and to submit them to streamlined review.

135. MCI's argument that nonrecurring charges will be increased to the detriment of small interexchange carriers renews its position, stated in previous rounds, that we should adopt a much more restrictive price cap regime that bands individual rate elements. LEC Price Cap Order, 5 FCC Rcd at 6813, para. 224. We believe the safeguards in our plan adequately respond to MCI's concerns. For example, in order to raise non-recurring charges and remain within the plan's cap and band limits, a LEC would have to reduce other recurring rates. A LEC is not likely to propose rate changes of this sort unless it represents a more efficient set of prices. Thus, the plan appears reasonable in this case as well as others. Moreover, as we have previously stated, streamlined review is not equivalent to automatic acceptance of within-band rates. Petitioners will have an opportunity to rebut the rates and address issues such as rate churn and discrimination. Moreover, even if a tariff is permitted to become effective without investigation, a complaint may be filed under Section 208 of the Act. The fact that the tariff

---

182 MCI Petition at 13-15.

183 MCI Reply at 15-18. MCI alleges that interexchange carriers are injured when LECs change their rates with relatively little notice, and that price cap regulation encourages LECs to migrate customers to more profitable services, because LECs can keep more profits under caps than they can under rate of return regulation.

is in effect will have no bearing on the determination of whether it is lawful.

C. Below-band Filings

136. A "below-band filing" is a tariff revision which proposes to decrease the existing rate by more than five percent. LEC Price Cap Order, 5 FCC Rcd at 6824, para. 305. Metropolitan says the Commission's standards for below-band tariff filings are less strict than the standards for above-band filings, and are inadequate to prevent cross-subsidization or predation.[184] Metropolitan claims that LECs could shift costs among services to establish unreasonable rate decreases as well as increases, and asserts that unreasonably low rates are not less offensive to the Communications Act than unreasonably high rates.[185] Metropolitan argues that the lack of detailed cost support data places an unfair burden on parties that may oppose such rate decreases.[186] Therefore, Metropolitan advocates that below-band filings require historical cost data for the preceding four years.[187] Finally,

---

184 Metropolitan Petition at 4. Metropolitan notes that the Commission requires detailed and disaggregated cost showings for all rate elements within the relevant basket, and an explanation of cost allocations among all baskets, for above-band filings, and states that this is intended to prevent unreasonable rate increases by preventing cost shifting among services and service categories.

185 Metropolitan Petition at 4-6; Metropolitan Reply at 5. Metropolitan contends that cost shifting is more likely now that digital equipment can be used to provide both switched and special access services. Metropolitan argues that the Commission's Strategic Pricing docket, as well as its efforts to require general tariffs for DS3 service, are recent examples of its acknowledgment of unreasonably discriminatory pricing. Metropolitan Reply at 5-6, citing Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part I, 5 FCC Rcd 400, 408 (1990); Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634, 8643 (1989).

186 Metropolitan Petition at 6. Metropolitan maintains that this is particularly true when a below-band rate decrease is preceded by one or more within-band rate decreases, because it is useful to analyze the historical relation between costs and rates.

187 Metropolitan Petition at 7; Metropolitan Reply at 7-8. Metropolitan contends that this cost showing would not be burdensome because carriers made similar showings under rate of return regulation.

Metropolitan complains that the average variable cost test does not produce standardized data that can be compared easily with data of other carriers.[188]

137. We stated in the LEC Price Cap Order that rate reductions are generally beneficial to consumers. We continue to believe that this is the case. Further, we are confident that the service basket structure we have adopted offers protection from anticompetitive pricing activity. We believe, further, that the average variable cost test provides us with a standard that will guard against rates that are anticompetitively low. In adopting average variable cost as a tariff review standard, however, we did not find that all rates that cover average variable costs are necessarily just, reasonable, and non-discriminatory. LEC Price Cap Order, 5 FCC Rcd at 6824, para. 310. These rates are still subject to challenge under Section 204.[189] A petitioner has the opportunity to show that a rate above average variable cost is nonetheless predatory, using relevant antitrust analysis and precedent. The Commission, upon reviewing the filing, can reject or suspend if warranted. Metropolitan's request, to require a much more substantial showing for below-band rates, appears unnecessary to the tariff review process, and contrary to ratepayers' interests since it would discourage legitimate rate reductions.[190] We accordingly decline to adopt Metropolitan's proposal.

IV. ELECTIVE PARTICIPATION IN PRICE CAP REGULATION

A. Small and Mid-Sized LEC Productivity

138. In the LEC Price Cap Order, the Commission refrained from mandating price caps for all LECs due in part to our concern that one productivity factor assigned to all carriers could prove unduly burdensome for smaller and mid-sized telephone companies. Instead, we made price caps voluntary for small and mid-sized LECs, and mandatory for the largest LECs. We postponed consideration of a separate productivity factor for small and mid-sized carriers until such time as we could develop a more complete record on this issue. We stated that we would examine this and other questions in a separate proceeding. LEC Price Cap Order, 5 FCC Rcd at 6799-6801, paras. 103-119. While some carriers support our intention to undertake a separate proceeding, a number of small and mid-sized carriers urge on reconsideration that we

---

188 Metropolitan Petition at 7.

189 Further, as noted with respect to within-band filings, complaints may still be filed under Section 208.

190 Accord USTA Opposition at 20; BellSouth Opposition at 21-22; SWB Opposition at 3; Bell Atlantic Opposition at 12-13 (all arguing against additional cost support requirements as a disincentive to lowering rates).

proceed immediately to assign them a lower productivity factor than that assigned to the largest LECs. These carriers assert that the current record is complete and clearly demonstrates that a lower productivity offset for them is justified and reasonable.[191] These carriers argue that the Commission's reticence to establish a lower alternative productivity offset is misguided and inexplicable. CBT states that the Commission did not attempt to search for one productivity factor that would reflect the experience of each of the RBOCs, but relies on the backstop mechanisms to equalize the RBOCs' diversity.[192]

139. USTA suggests that Tier 1 carriers that have not yet elected price cap regulation should be allowed to elect at a 1.8 productivity factor (including CPD).[193] CBT proposes that the Commission parallel our plan for the RBOCs and GTOC by offering a second higher productivity offset of 2.8 percent that can be elected by mid-sized carriers under price caps and that would operate with the same sharing mechanism as that in place for the RBOCs and GTOC at the 4.3 percent productivity offset level. Rochester also suggests an alternative: that the Commission provide small and mid-sized carriers with additional choices lower than the current 3.3 percent or 4.3 percent productivity options, coupled with narrower sharing ranges.[194] USTA

---

191 For example, although CBT supports the optionality of the price cap plan for mid-sized and smaller LECs, it maintains that the plan is designed primarily for the largest LECs, and that our failure to adopt a lower and more reasonable productivity offset for this group of carriers is likely to eliminate their opportunity to extend the benefits of price cap regulation to their customers. CBT Petition at 2-3. See also SNET Petition at 2; Rochester Petition at 5; USTA Petition at 22; Contel Petition at 2.

192 CBT Petition at 9. In CBT's view, the Commission is applying unreasonably rigorous standards in the selection of productivity differentials for mid-sized and smaller LECs. CBT says that it has provided graphic demonstration, by four different study approaches, of its own historical productivity. These carriers contend that the Commission would risk little by immediately adopting a lower mid-sized productivity offset, since the sharing mechanism already established would serve as a safeguard against high earnings. SNET says that the Commission could continue to examine the issue of mid-sized and small company productivity while monitoring actual results. SNET Petition at 5.

193 USTA Petition at 22. See also Rochester Petition at 5; SNET Petition at 8; PRTC Opposition at 2-4; but see ICA Opposition at 1-3. This offset, CBT says, would operate with the same sharing mechanism as is in place for the RBOCs and GTOC at the 3.3 percent productivity offset level. CBT Reply at 8.

194 In illustration, Rochester proposes offset options of 2.3 percent and 1.3 percent with a no sharing zone of 100 basis points and zero basis points

seeks to expand Rochester's proposal still further, contending that Tier 2 and smaller carriers should be allowed to elect price cap regulation on an optional basis at zero productivity (or .5 percent including the CPD).[195] Other small and mid-sized carriers support the Commission's separation of the alternative productivity issue to a separate proceeding to deal with matters relating to small and mid-sized LECs.[196]

140. MCI and AT&T urge us to reject Rochester's request for optional lower productivity offsets conditioned on lower earnings ceilings.[197] AT&T maintains that CBT, Rochester, and SNET have not proven that they are incapable of operating as efficiently as United or Contel, which have elected price caps, nor have they shown how granting them a reduced productivity factor would benefit their customers.[198]

---

respectively. Sharing above the no sharing zone would be at 50 percent for both options. The zone at which participating LECs are required to return 100 percent of their earnings in the form of lower rates would begin at 15.25 percent rate of return for the 2.3 percent option and 14.25 percent rate of return for the 1.3 percent option. Rochester Petition at 7; Rochester Reply at 3-5. Rochester adds that, to help small LECs choose price caps, the Commission should treat equal access costs as exogenous, adopt a streamlined waiver mechanism for small LECs, and resist pressures to increase the expense and administrative burdens of service quality monitoring and reporting. USTA and PRTC endorse Rochester's proposal. USTA Opposition at 8; PRTC Opposition at 5. While Centel says that it does not necessarily agree with the specific earnings levels or sharing ranges proposed by Rochester, it emphasizes that it is not opposed to Rochester's basic objective of linking productivity with sharing. Centel Opposition at 7.

195 USTA Opposition at 8; see also Centel Opposition at 7-8.

196 Contel Petition at 2 n.1; TDS Reply at 9-10. Contel states that the fact that it was one of only two carriers that elected price caps serves to underscore the need to address small and mid-sized company price cap issues, including the appropriate productivity factor for such LECs, in further proceedings. TDS too advocates an immediate rulemaking on small company issues, and states that this rulemaking should modify the price cap merger rule, establish a small LEC productivity factor of 1.8 percent, adopt NECA's carrier common line formula, and modify the exogenous cost, waiver, and service quality reporting requirements for small LECs.

197 MCI Opposition at 10 (asserting that the Commission's price cap plan is already enough of a regulatory "smorgasbord" without adding more choices).

198 AT&T Opposition at 5 n.*. AT&T argues that if small and mid-sized LECs are to be excused from achieving average industry productivity, large LECs should not be permitted to use productivity factors that reflect in part the

141. There are two main considerations in our determination to leave unchanged at this point the levels established for Tier 1 productivity offsets. First, we remain persuaded that the 3.3 percent productivity offset we established for Tier 1 carriers can appropriately be applied to all Tier 1 carriers. As we explained in the LEC Price Cap Order, 5 FCC Rcd at 6796-99, paras. 75-102, the 3.3 percent offset is based on our short term study of Tier 1 carrier productivity, adjusted downward to account for long term productivity measures. This number was selected only after an exhaustive review of a substantial body of record evidence on LEC productivity. While it is impossible to say with certainty that the 3.3 percent productivity factor captures exactly the productivity characteristics of each of the Tier 1 companies, the record on LEC productivity for carriers below the largest eight does not conclusively show that a different number should be assigned to that class and what that number should be. Indeed, that our productivity offset may be appropriate for this class of carriers is underscored by the voluntary price cap election of United, Contel, Rochester, and SNET.

142. Second, even if we were persuaded that the remaining Tier 1 carriers necessarily can achieve only substantially lower productivity, justifying the development of a separate productivity offset for them, we are not persuaded that the evidence before us is sufficient to establish such an offset.[199] While it is true that some mid-sized LECs have provided us with information concerning their own productivity, we still face a dilemma, as we explained in the LEC Price Cap Order, in attempting to translate their productivity experiences to other, particularly smaller, LECs, let alone all small and mid-sized LECs. Although some LECs, such as CBT, Rochester, or SNET, may as they state have nothing further to contribute to the Commission to document their own productivity experience, it may well be that other companies with resource bases quite different from these companies will come forward in a future investigation to provide information useful in designing an overall productivity factor for this group of companies.

---

alleged lesser productivity of smaller LECs. See also MCI Opposition at 7-9. MCI objects to the characterization of some LECs that the prescribed rate of return was selected by the Commission specifically to serve its price cap plan for the largest LECs. See, e.g., Citizens Petition at 2-4. On the contrary, says MCI, the rate of return established in the Represcription Order is entirely separate from the price caps docket and is intended as a stand-alone requirement that would apply especially to the 1400 non-price cap LECs. Accordingly, MCI dismisses as without merit the implied argument of some non-price cap LECs that they are doubly disadvantaged by being foreclosed from price cap regulation by operation of a high productivity offset and by a rate of return prescription that is inadequate.

199 See AT&T Opposition at 5.

143. Indeed, as we noted in the LEC Price Cap Order, 5 FCC Rcd at 6827, para. 331, this proceeding has stimulated much comment and interest from small and mid-sized LECs who seek regulatory options to allow them to participate in price cap regulation. In response, we believe we should continue, as planned, to examine the range of issues affecting this group of carriers and their customers to ensure that desirable regulatory reforms are applied as broadly as possible, and with sensitivity to special circumstances, as the need arises. We add that we are not attempting to find the one "elusive" productivity factor, as some carriers charge, that could be precisely applied to all mid-sized and small companies. Rather, we simply believe it prudent to inquire further into productivity issues that affect these carriers, in a proceeding focused specifically on their needs.

144. Specifically, we plan to review in detail the Rochester or "extended plan" proposals that would provide mid-sized and small companies greater accessibility to the price cap program. To do this, we propose to solicit comments that might be useful to evaluate whether, for example, any relationship exists between the proposed offsets of the plan and their no-sharing zones and maximum earnings levels, or what effects these might have on efficiency incentives and service quality. We will also examine the potential benefits of such an "extended plan" to users -- a factor not fully developed in the pleadings now before us, but, obviously, essential to our considerations. We believe that a separate proceeding will allow us to consolidate these and a number of other issues of special interest to small telephone companies that appear to require further consideration. We stated in the LEC Price Cap Order, 5 FCC Rcd 6826, para. 330, that among the issues that might require inquiry are the impact of regulatory change on NECA and the pools, and the impact on average schedule companies. Also, rate of return calculations have largely been developed from the capital costs of the Tier 1 telephone companies and then applied on a unitary basis for all LECs, so that some modification of this process might be desirable in the future in the context of smaller companies. Further, we expressed, and now affirm, our interest in exploring other and alternative regulatory approaches to the unique concerns of smaller telephone companies. A separate proceeding will allow us to consider many of these issues together, which we believe would be useful to their successful resolution.

145. Finally, although it seems obvious, we note in response to those LECs that argue that small and mid-sized LECs have been somehow "shut out" from the benefits of incentive regulation, that the price cap program is clearly open to them on a voluntary basis. While some carriers for whom price caps is optional may determine that the price caps program is not for them, the fact that some LECs have elected incentive regulation gives us an indication that the price cap program can indeed provide benefits to this class of carriers. We will examine this and related issues as we consider questions relating to small and mid-sized carriers in a separate proceeding.

B. Mergers and Acquisitions

146. Our Rules require that when a rate of return company and a price cap company merge, or when one company acquires the other, the resulting company comply with price cap regulation within a year of the merger. LEC Price Cap Order, 5 FCC Rcd at 6821, paras. 282-284. Some LEC petitioners claim that this policy is unnecessary, and inhibits mergers and acquisitions, thus detracting from companies' market value and artificially restricting business decisions.[200] These carriers assert that mergers and acquisitions should be encouraged, not restricted.[201] They contend that the harms we seek to avoid are unlikely.[202] Two parties contend that improper cost shifting

---

200 BellSouth Petition at 19-21; NTCA Petition at 12-14; TDS Petition at 1-3; TUECA Petition at 1-2; USTA Petition at 23-24; PRTC Opposition at 6. Some of these petitioners argue that a larger rate of return carrier acquiring a smaller price cap carrier should be allowed to convert that carrier back to rate of return regulation. NCTA Petition at 13; TDS Petition at 15-18; TUECA Petition at 3-4; NECA Reply at 7. TDS advocates a merger rule requiring the smaller carrier to convert to the regulatory status of the larger carrier. TDS Reply at 7. NECA argues that a size limitation would prevent price cap LECs from acquiring rate of return LECs only to convert to rate of return regulation. NECA Reply at 7. NECA, BellSouth and TDS argue that the merger rule requires acquired small carriers to meet a productivity offset designed for large LECs. NECA Reply at 8; BellSouth Petition at 20; TDS Petition at 5-6.

201 TDS emphasizes the mergers and acquisitions may increase productivity by increasing economies of scale, increasing availability of network upgrades, and optimizing routing and ratemaking efficiencies. TDS Petition at 4-5. TDS criticizes the merger rule for creating disincentives for efficiency-increasing mergers. TDS Petition at 7-8. See also PRTC Opposition at 6 (contending that the carriers for which mergers would be most useful, carriers with high costs and in need of infrastructure development, are the carriers least likely to benefit from price cap regulation).

202 NECA Reply at 7-8; TDS Petition at 20-21; TDS Reply at 4-7 (asserting that claims of cost-shifting are speculative, and stating that cost shifting would not occur if the new entity could choose to be either all rate of return or all price cap. TDS contends that few LECs would allow themselves to be acquired by another firm and give up their corporate identity only to escape from price cap regulation.) TDS and Rochester contend it is not likely that a large rate of return company would acquire a small price cap company in order to manipulate the price cap rules. TDS Petition at 12-13; Rochester Reply at 10. They also request that the Commission clarify the effects of the merger rule on the purchase and sale of part of a LEC's service region, or an individual exchange. TDS Petition at 18-20; NECA Reply at 7; TDS Reply at 8.

could be prevented by non-structural accounting rules.[203] One party asserts that the merger and acquisitions rule is inconsistent with our pooling rules.[204]

147. MCI supports the rule, however, and contends that forced conversions to price cap regulation as a result of the all-or-nothing rule will be rare, because few small independent LECs have expressed an interest in price cap regulation at this time.[205] MCI also disputes petitioners' assurances that no harms are likely to occur, stating that the forced conversions that do occur will be justified by the need to prevent cost shifting between price cap carriers and rate of return carriers.[206]

---

203 PRTC Opposition at 7-8; TDS Reply at 5.

204 TDS Petition at 8-10, citing Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions, CC Docket No. 89-2, 5 FCC Rcd 231 (1989) (Pooling Order). TDS notes that the Pooling Order allows merging LECs to retain their pre-merger NECA pooling status, and argues that cost shifting between pool companies and non-pool companies was an issue in the Pooling Order. According to TDS, the Commission found in the Pooling Order that the need to prevent cost shifting was outweighed by a desire to make the pooling rules neutral in terms of their effect on mergers. TDS alleges that the price cap merger rule interferes with the same business decisions protected in the Pooling Order, and may adversely affect the marketability of small LECs. See also Rochester Reply at 10-11; TDS Reply at 3. TDS discounts the Commission's explanation that the price cap merger rule need not be consistent with the NECA pool merger rule because the incentive to shift costs is much higher in the price cap context. Several parties note that LECs must leave the NECA pool when they choose to be regulated under price caps, and argue that the price cap merger rule could adversely affect the pool or small pool participants by forcing them to leave. NECA Reply at 7; TDS Petition at 11-12; PRTC Opposition at 6. NECA claims that it is not administratively difficult to deal with companies with some affiliates in pools and some out, and concludes that it would not be more difficult to deal with companies with some under price caps and some under rate of return. NECA Reply at 8.

205 MCI Opposition at 37-39. NECA, TDS and NTCA disagree with MCI's estimate of the number of forced conversions. NECA Reply at 9; TDS Reply at 3; NTCA Reply at 9-10. TDS argues that if MCI is correct that the number will be very low, this supports the absence of a need for any merger rule. TDS Reply at 3-4. TDS also argues that many small LECs may opt for price caps in the future. TDS Petition at 6-7.

206 MCI Opposition at 39-40.

148. In the LEC Price Cap Order, the Commission recognized that this merger rule might influence LECs' business decisions regarding mergers and acquisitions. We found that this was appropriate in order to minimize improper practices. First, without the all-or-nothing rule, a LEC might attempt to shift its costs from its price cap affiliate to its rate of return affiliate. This would allow the LEC's rate of return affiliate to earn more revenue without affecting the revenue of the price cap affiliate, and would disserve the public interest by allowing higher rates. LEC Price Cap Order, 5 FCC Rcd at 6819, para. 272. Second, if a LEC were allowed to revert to rate of return regulation after it opted to submit to price cap regulation, it could "game the system" by building up a large rate base under rate of return regulation, then opt for price caps again and cut its costs to an efficient level. Letting the LEC alternately "fatten up" under rate of return and "slim down" under price caps would disserve the public interest, since rates would not fall the way price caps urge. LEC Price Cap Order, 5 FCC Rcd at 6819, para. 269.

149. We continue to believe that improper cost shifting and "gaming the system" are practices with which the Commission should be concerned. Petitioners' generalized assurances in this regard are not persuasive, nor do the petitioners argue that their proposed rules would limit these improper practices as effectively as the existing merger rule. As we did in the Pooling Order, we must weigh the need for the proposed protection against the restrictions it might impose. In this case, we find that the threats of cost shifting and "gaming the system" are severe enough to warrant a merger rule that may induce some to forego mergers and acquisitions that they would otherwise have undertaken.[207] As noted previously, differing considerations in this context lead to a different approach than in the NECA pool context. LEC Price Cap Order, 5 FCC Rcd at 6821, para. 284.

C. Initializing Indices for Elective LECs

150. SNET states that Section 61.48(d) of the new price cap rules directs that companies entering price caps effective January 1, 1991, assign their initial PCIs, APIs, and SBIs a value of 100. This value, it notes, corresponds to costs and rates in effect July 1, 1990, a date six months prior

---

207 Some parties contend that our merger rule does not contemplate the purchase and sale of part of a study area. These parties are mistaken. The purchase of part of a study area is treated like the acquisition of an entire LEC. We will not create a loophole in which a LEC could avoid the merger rule by selling all but one of its exchanges. However, we realize that in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of "gaming the system." Such cases might justify narrow waiver of the all-or-nothing rule.

to the effective date of the initial price cap tariffs.[208] However, SNET contends, the rules do not address how optional LECs entering price caps with subsequent annual filings would initialize their indices. SNET assumes that the Commission intended such LECs to base their indices on rates in effect six months prior as well. Accordingly, by SNET's estimate, LECs entering price caps with an annual tariff filing effective July 1 would set their indices equal to 100 based on rates in effect on January 1 of the same year. SNET requests that the Commission clarify this aspect of the price cap rules. MCI contends that any rules in this area should be delayed to the small LEC proceeding, and warns against rules that would allow LECs too much influence over their initial rates.[209]

151. We adopt SNET's proposed clarification. The initial indices of the mandatory price cap carriers were based on the rates in effect six months prior to the date their price cap rates took effect. We found that these rates were reasonable starting points for price cap regulation in part because the rates were subject to extensive review under rate of return regulation, and because use of these rates avoids the possibility of attempted pricing revisions in anticipation of price caps. We also found that the operation of our price cap rules would drive rates to become more reasonable as time goes on. LEC Price Cap Order, 5 FCC Rcd at 6814, para. 232. Under the clarification granted here, LECs' initial price cap rates would also undergo extensive review under rate of return regulation, and would also be driven by the price cap rules to be more reasonable. Therefore, this modification will also result in reasonable starting points for LECs adopting price cap regulation in the future. Because several LECs have announced that they will elect price caps, we will not defer consideration of this matter. We accordingly modify Section 61.48 of our Rules to reflect this change.

V. APPLICATION OF THE PCI TO LEC SERVICES

A. Existing Rates

152. In the LEC Price Cap Order, we found that the rates in effect on July 1, 1990, as adjusted by subsequent errata, represented a reasonable basis from which to begin price cap regulation. LEC Price Cap Order, 5 FCC Rcd at 6814-17, paras. 232-244. Those rates were the product of an annual access review process, and represented the latest set of rates shaped by an ongoing rate of return review process dating back to 1984. Moreover, we decided that we would adjust the July 1, 1990 rates downward to reflect the decrease in authorized rate of return from 12 percent to 11.25 percent, effective January 1, 1991. LEC Price Cap Order, 5 FCC Rcd at 6816-17, paras. 245-250. We

---

208 SNET Petition at 12.

209 MCI Opposition at 47.

also indicated that appropriate adjustments would be made as a result of any finding of unlawfulness made in investigation or complaint proceedings relating to pre-price cap rates. Id. at 6815-16, paras. 241-244. On reconsideration, MCI continues to challenge our decision to employ July 1, 1990 rates, as adjusted, as a starting point for price cap regulation.[210]

153. We reject arguments that would have us investigate the complete set of LEC rates in effect on July 1, 1990, or that would have us make an affirmative finding that these rates are just and reasonable. We do not believe as a legal matter that such procedures are necessary prior to inaugurating a price cap system. AT&T Price Cap Order, 4 FCC Rcd at 3303-05, para. 893. Nor do we believe as a policy matter that such procedures are necessary, given the prior review these rates, and changes to them, have received. Moreover, since rates for LEC services under price caps can be investigated and, except to the extent that they comply with a Commission prescription, remain subject to the complaint process, we need not resort to an affirmative finding of the justness and reasonableness of each LEC rate in order to launch a price cap system.[211] As we have repeatedly stated, price cap indices, as well as the indices measuring rate levels, will be adjusted to reflect the outcome of an investigation or complaint, as circumstances dictate. LEC Price Cap Order, 5 FCC Rcd at 6816, para. 241. We therefore adhere to our view that July 1, 1990 rates, as adjusted, are a suitable point from which to inaugurate price cap regulation.[212]

---

210 MCI Petition at 3-4; MCI Reply at 3.

211 Only filings that make price changes within cap and band limits are presumed lawful and streamlined, and even filings that are subject to streamlining may be investigated, under certain circumstances. LEC Price Cap Order, 5 FCC Rcd at 6822, para. 294. The only complaints foreclosed by price cap regulation are those based upon total interstate earnings. See Section VI.C. of this Order, infra.

212 We also reject other arguments MCI makes with respect to our use of July 1, 1990 rates. First, MCI argues that LECs' Actual Price Indices (APIs) should be subject to an upward adjustment to the extent that any LEC admitted that it was targeting rate elements below the target rate of return. MCI Petition at 34-35. MCI ignores the purpose of the API, which is intended to be a measure of rates as they are, in order to increase API levels. Unless the API measures rates as they are we cannot be sure that the LECs are adhering to price cap and banding limitations on their prices. MCI also argues that we should impose an exogenous cost decrease on New York Telephone's PCIs to reflect tax costs MCI alleges are embedded in the starting rates improperly. MCI Petition at 33-34. MCI also raised this question in a petition to investigate the New York Telephone tariff retargeting rates from 12 percent to 11.25 percent. Local Exchange Carriers' January 1, 1991 Access Tariff Revisions, 6 FCC Rcd 92 (Com.Car.Bur. 1990) (Retargeting Order). The

154. We also deny a request to determine whether any action we may take upon review of the 1990 Annual Access Order would result in an exogenous adjustment in LEC PCI levels.[213] The request focuses on the possibility of PCI adjustments based on the possibility of findings on applications for review of the Common Carrier Bureau's order in that proceeding. This question is too speculative to permit us to make a determination at this time.

B. Baskets and Bands

1. Subindices for DS1 and DS3 Services

155. In addition to isolating special access services into their own basket, and placing high capacity and Digital Data Service offerings in a separate service category within that basket, we decided that additional pricing protections were necessary for ratepayers taking DS1 and DS3 high capacity offerings. LEC Price Cap Order, 5 FCC Rcd at 6813, para. 223. In recognition of the pricing issues historically presented by these two offerings, we decided to limit, but not eliminate, the ability of LECs to change the prices for these offerings within the confines of the high capacity service category. We created two subindices, one for DS1 rates and one for DS3 rates, that limit annual movement in the prices for each of these services to 5 percent per year, adjusted for changes in the cap. The LECs challenge these subindices as inconsistent with price cap policies they perceive were applied to AT&T, which they argue provide more pricing flexibility whenever AT&T is facing competition.[214]

156. LEC arguments suggesting that the subindices we created will ignore their needs to change prices in a competitive environment appear overstated. Our price cap regulations respect the statutory system of carrier-initiated rates, by recognizing that LECs can file rates outside the cap and band "no-suspension zone." While such filings are subject to longer notice periods, and additional support requirements, they are not banned.

157. We are not persuaded by LEC arguments that AT&T has received greater pricing flexibility. We note, for example, that MTS, a single service, is itself divided into three service categories, two of which face

---

Bureau said that these tax expenses should be removed on July 1, 1991. Retargeting Order, 6 FCC Rcd at 94, para. 25. We agree. Therefore, the adjustment MCI advocates is not required.

213 SWB Petition at 12-13.

214 E.g., USTA Petition at 8-10; GTOC Petition at 3-6; SWB Petition at 21-22; NYNEX Opposition at 12.

tighter banding constraints than either DS1 or DS3. Competition for a service has never been the sole determinant of basket and category design. We must determine the amount of pricing flexibility in light of the regulatory history of the service, its pricing history, the identity of ratepayers, the ability of ratepayers to obtain alternatives, as well as other market conditions. Our judgments are based on these varying circumstances, as illuminated by the record and our own experience with these offerings. In the case of the DS1 and DS3 subindices, we decided to weigh heavily ratepayers' long-standing concerns with the pricing of these services.

158. Other parties, while supporting the decision to create the subindices, argue that the subindices must be supplemented with continued administration of the strategic pricing guidelines developed under rate of return regulation.[215] These parties argue that the cross-over ratios created to guide the pricing relationships of DS1 and voice grade service, will be quickly breached if DS1 rates are allowed to migrate 5 percent a year.[216]

159. The strategic pricing guidelines were a product of the rate of return regulatory system. While price cap regulation continues to take costs into account, it is intended to allow rates to migrate away from fully distributed costs and toward a set of rates that are more economically efficient. LEC Price Cap Order, 5 FCC Rcd at 6791, paras. 34-35. We adhere to our decision to eliminate the application of strategic pricing guidelines to price cap carriers' rates.[217]

---

215 Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part I, 5 FCC Rcd 400 (1990) (Strategic Pricing Reconsideration Order).

216 MCI Petition at 38-40; MCI Opposition at 34-37; IDCMA Opposition at 19; Ad Hoc Opposition at 19-21.

217 Several parties have also argued that they were given inadequate notice of our decision to adopt the subindices. E.g., SWB Petition at 21-23. The supplemental notice in this proceeding, which immediately preceeded the adoption of the LEC Price Cap Order, specifically raised the issue of using subindices to constrain special access pricing. Supplemental Notice, 5 FCC Rcd at 2292-93, para. 246. See also ICC Opposition at 5-6 (arguing that concerns about DS1 and DS3 pricing have been highlighted throughout this proceeding).

2. Common Line Basket

a. National Average Carrier Common Line Rate

160. As adopted, the LEC price cap regulations are designed to make use of actual historical demand data, instead of forecast demand data. Elimination of demand forecasting is one of the ways in which price cap regulation reduces the administrative burden associated with regulation. In the case of the national average carrier common line rate, however, the LEC Price Cap Order required price cap carriers to continue to forecast common line demand pursuant to Part 69.105(b). LEC Price Cap Order, 5 FCC Rcd at 6826, para. 329.

161. NECA, supported by the largest LECs, has renewed the suggestion that historical demand data can be used to calculate the national average carrier common line rate. NECA says this can be done without significantly affecting Long Term Support payments.[218] In support of its claim, NECA provides a calculation of the national average carrier common line rate using the existing method and NECA's forecast method as that rate would have been calculated for the November 1, 1990 access filings. NECA's calculations show that the rate using historical actual demand would have been slightly lower than the method using forecast demand.[219] As a result, the required Long Term Support payments would have been approximately $3 million higher than they were using the forecast method. According to NECA, this result is consistent with the Commission's goal of preserving rate parity for carrier common line charges between pooled and depooled companies, a goal that NECA argues should not be abandoned now that some depooled companies will be regulated under price cap regulation.[220]

162. The interexchange carriers oppose use of historical demand data in the calculation of the national average carrier common line rate for two reasons.[221] First, they argue that NECA's submission fails to address how

---

218 NECA Petition at 3-5; NYNEX Petition at 7-8; Pactel Petition at 21; USTA Petition at 19. See also NTCA Petition at 9-12 (supporting the NECA proposal as a second-best alternative, and arguing that the Commission should require that calculations be done on both a forecast and a historical basis to determine effects on carrier common line rate disparity over time).

219 NECA Petition at Exhibit 1 (terminating premium would have been $0.0110 instead of $0.0114 and terminating nonpremium would have been $0.0050 instead of $0.0051).

220 NECA Reply at 5.

221 AT&T Opposition at 7-9; MCI Opposition at 42-45.

use of historical data would affect the rate in the long term, under a variety of circumstances, since NECA looked only at the rate filed with the November 1, 1990 filings. Secondly, AT&T argues that the plan gives price cap LECs a direct incentive to set their CCL as high as the cap mechanism allows in order to raise the level of the national average carrier common line charge, and thereby lower Long Term Support payments to the pooled carriers who remain under rate of return.[222]

163. The pricing flexibility afforded by the price cap plan will give price cap carriers the opportunity to affect their carrier common line rates, their Long Term Support obligations, and consequently the national average carrier common line rates charged by NECA pool participants. However, we are not persuaded that any LEC would have any strong incentive to manipulate carrier common line rates or seriously threaten the objectives of the Long Term Support Program. First, Long Term Support payments are a small component of a carrier's total costs.[223] Second, any decrease in Long Term Support payments would be at least partially offset by increases in carrier common line rates. None of the parties expressing concern over LECs' ability to influence Long Term Support payments has submitted any numerical data supporting its claim. On the other hand, NECA submits information indicating that adoption of its proposal would have only a slight effect on carrier common line rates.

164. We believe that the benefits that may be derived from NECA's proposal outweigh any possible problems. Currently, forecasting the national average carrier common line rate requires extensive and detailed support documentation annually, which is time consuming for the carriers to prepare and taxing for the Commission to review. NECA's methodology will greatly simplify the preparation of the national average carrier common line rate, which is consistent with the goals of price cap regulation. Therefore, we adopt NECA's methodology, and revise Section 69.105(b) of our Rules accordingly.

---

222 But see MCI Opposition at 45 (use of NECA's method will increase the Long Term Support payments of depooled, price capped LECs, and those costs would be passed along to interexchange carriers). NTCA also agrees with AT&T that NECA's proposed methodology may lead to price cap CCL rates that are higher than they would otherwise be. NTCA Petition at 7-9.

223 In the 1990 annual access filing for the period from July 1990 to June 1991, Long Term Support payments from all Tier 1 companies were $252 million. Total Common Line revenues for all Tier 1 companies were $8.9 billion. 1990 TRP, Table COS 1-P. Total Carrier Common Line revenues for this period were $3.5 billion. 1990 TRP, Table RTE 3.

b. Subscriber Line Charge

165. LEC petitions for reconsideration also argue that use of historical demand data and historical revenue requirements to compute subscriber line charges would ease administrative burdens associated with these calculations for price cap companies.[224] USTA supports this proposal with a chart showing how the multiline business charge would be changed on a study area basis from 1990 through 1992 if the use of historical data were permitted.[225] MCI argues that the LECs have not demonstrated that existing calculations are in fact burdensome, and that the conversion of subscriber line calculations from those based on forecasts to those based on historical actuals will produce a one-year lag in the decline of the residual carrier common line charge.[226]

166. Revisions in subscriber line charges directly affect end users, while revisions in the national average carrier common line rate affect end users only indirectly through its influence on NECA access charges and long term support charges. In addition, the current subscriber line charge structure resulted from extensive joint board deliberations, which we are reluctant to revise at this time without at least informal discussions with state regulatory representatives. For these reasons, we will not sanction any modification in subscriber line charges without an extensive showing that the interests of ratepayers would not in any way be adversely affected by the modification. Petitioners have not made a sufficient demonstration that substitution of historical data would not prejudice some ratepayers or carriers so as to warrant adopting this suggestion at this time.

3. Other Issues

167. Hawaii, while supporting the creation of a separate basket for interexchange offerings, argues that there is no mechanism within the price cap system to ensure that a carrier offering interexchange service is charging itself the correct access rates, and not shifting the costs of access onto competing providers of interexchange service. Hawaii argues that price cap LECs should be required to report cost and demand data that will reveal what proportion of switched access should be billed to each of their interexchange customers. Hawaii argues this is particularly important in view of the Commission's decision not to impose service categories on the interexchange basket, particularly with respect to GTOC.[227]

---

224 USTA Petition at 17-21; Pactel Petition at 20-23 and App. B.

225 USTA Petition at Attachment.

226 MCI Petition at 40-42.

227 Hawaii Petition at 5-6.

168. The Commission requires any exchange carrier offering interexchange service to impute to itself the same costs that it uses to develop the access rates that it charges its interexchange customers.[228] Our adoption of price cap rules was not intended to limit this requirement in any way. LEC Price Cap Order, 5 FCC Rcd at 6812, para. 213. We find, however, that the operation of this policy alone does not provide sufficient assurance that our interests in promoting fair interexchange competition will be met. We agree with Hawaii that the interexchange basket, by itself, does not provide a mechanism to determine if a carrier is properly imputing access charges to itself. However, Hawaii's proposal, requiring detailed reporting of cost and demand data, seems excessive, given that the interexchange basket represents a relatively small portion of total LEC earnings. Therefore, we direct the Chief, Common Carrier Bureau, pursuant to delegated authority, to modify the Tariff Review Plan (TRP) to require LECs offering interexchange services to report data necessary to ensure that our requirements are being followed.

169. Hawaii also fears that price cap regulation could lead to geographic rate deaveraging, and asks the Commission to either mandate averaged rates, or develop a study showing that toll rates will remain averaged.[229] Pactel argues that Hawaii's fears regarding averaged rates are unfounded because AT&T has not attempted to deaverage rates in the past, even though it has been paying deaveraged traffic sensitive access rates since 1984 and deaveraged carrier common line rates since 1989.[230]

---

228 See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Memorandum Opinion and Order on Further Reconsideration, CC Docket No. 85-229, 3 FCC Rcd 1135, 1141, para. 46 (1988) (Computer III Further Reconsideration) (a BOC offering enhanced services must impute to itself the same averaged rate for transmission as it charges its enhanced services competitors); vacated on other grounds, California v. FCC, 905 F.2d 1217 (9th Cir. 1990). The Court of Appeals vacated the Computer III Further Reconsideration for two reasons. First, the Court found that the Commission was arbitrary and capricious in not providing an adequate explanation for abandoning its policy of requiring BOCs offering enhanced services to do so only through a separate subsidiary. Second, the Court concluded that the Commission improperly pre-empted state regulators. California v. FCC, 905 F.2d at 1246. The Commission's policy of requiring BOCs to impute to themselves the same charges that they impose on others is still in effect. This policy applies also to non-BOC LECs.

229 Hawaii Petition at 2-3; Hawaii Reply at 1-2.

230 Pactel Opposition at 31.

170. This Commission has consistently committed itself to protect and defend geographic rate averaging in the past,[231] and we have continued to voice our support for geographic rate averaging in this proceeding.[232] We have pledged that any attempt by AT&T to propose deaveraged rates would be subjected to full suspension, investigation, and fullest scrutiny. AT&T Price Cap Order, 4 FCC Rcd at 3133, para. 539. We now repeat that pledge with respect to LECs. Any such filing will be subject to the full 120-day notice period provided under Section 203 of the Act, and will be suspended for investigation for the full five-month period provided for under Section 204 of the Act. In the course of the investigation, the LEC would bear the burden of justifying its proposal, and, given our strong commitment to geographically averaged rates, the showing we will require will be difficult to meet. We believe these measures will fully protect against geographic deaveraging, and therefore find that the reporting requirements advocated by Hawaii are not necessary at this time.

C. Service Exclusions

171. The LEC Price Cap Order identified a few services that would be excluded from price cap regulation. LEC Price Cap Order, 5 FCC Rcd at 6810, paras. 191-197. We cited several different reasons for excluding these services. Some, such as Individual Case Basis offerings or offerings to the Federal Government, are more in the nature of contract-type offerings for which price cap regulation appears inconsistent. We also excluded certain LEC offerings whose function and regulatory history made them difficult to place within the system of baskets and bands we created. These offerings, such as presubscription charges applicable when an end user changes to a different primary interexchange carrier, or foreign exchange arrangements that permit end users to obtain local service from an adjacent study area when service from their own study area is not available, are very different from interstate access charges or even interexchange services that are included in price cap regulation.

---

231 See, e.g., MTS and WATS Market Structure, Third Report and Order, CC Docket No. 78-72, 93 FCC 2d 241 (1983); Guidelines for Dominant Carriers' MTS Rates and Rate Structure Plans, Notice of Proposed Rulemaking, 100 FCC 2d 363, 375 (1985), and Memorandum Opinion and Order, FCC 85-540, released Oct. 17, 1985; MTS and WATS Market Structure, Recommended Decision and Order CC Docket Nos. 78-72 and 80-286, FCC 87J-1, 2 FCC 2d 2324 (Joint Board, 1987); MTS and WATS Market Structure, Report and Order, CC Docket Nos. 78-72 and 80-286, 2 FCC 2d 2953 (1987).

232 AT&T Price Cap Order, 4 FCC Rcd at 3132-34, paras. 537-541, and 3279-82, paras. 847-855; LEC Price Cap Order, 5 FCC Rcd at 6826, para. 330.

172. Although no party has objected on reconsideration to our delineation of excluded and included services, MCI says we should declare that the prices of services excluded from price caps must comply with all the Commission's rules established for rate of return regulation, that the costs of excluded services should be removed from the API, and that each new service must be targeted at the authorized rate of return.[233] According to USTA and NYNEX, MCI has not shown that rate of return regulation for excluded services is necessary or appropriate.[234] BellSouth contends that a requirement to target each new service at the authorized rate of return is stricter than that required under rate of return regulation.[235] Pactel notes that most of the services excluded from price caps are offered on a negotiated or competitive bidding contract basis, and maintains that rate of return regulation would be inappropriate for these services.[236] Pactel observes that sharing obligations and ARMIS reporting requirements are made on a total interstate basis, and concludes that earnings on services excluded from price cap regulation are included in sharing obligations.

173. The LEC Price Cap Order did not change existing regulation of the excluded services. These services, accordingly, continue to be regulated under a traditional approach, and are excluded from price cap regulation and its requirements (such as sharing). We reject MCI's argument that APIs must be adjusted downward to remove costs of excluded services. Prices going in to price cap regulation were established by allocating costs to specific service categories. Excluded services' rates were developed by allocating their costs to them, specifically, so no costs of excluded services are included in the current APIs.

VI. REPORTING AND MONITORING

A. Service Quality and Infrastructure Reporting

1. Service Quality Reporting

174. The LEC Price Cap Order expanded monitoring of service quality as follows: the semi-annual service quality reports (containing measures of customer satisfaction, dial tone speed, and transmission quality) already

---

233 MCI Petition at 35-36; MCI Reply at 42, citing Revised Section 65.1 of the Commission's Rules, LEC Price Cap Order, Appendix B, 5 FCC Rcd at 6877.

234 USTA Opposition at 21; NYNEX Opposition at 15.

235 BellSouth Opposition at 18.

236 Pactel Opposition at 21-22.

required from the RBOCs are also required of GTOC; quarterly reports containing measures of installation intervals, repair intervals, network blockage, switch downtime, blocking rates, service order response time, and post-dial delay are required of all price cap LECs. LEC Price Cap Order, 5 FCC Rcd at 6827-29, paras. 332-349. The Commission directed the Common Carrier Bureau to develop specific reporting requirements and formats.[237]

175. Several petitioners ask the Commission to modify and expand the service quality safeguards adopted in the LEC Price Cap Order.[238] These parties suggest that the LECs will have strong incentives to reduce network maintenance and investment selectively, in order to increase short-term profits.[239] They urge that cutting service quality would be a rational response to the incentives and opportunities created by price cap regulation, that short-term earnings performance is prized by the investment community, and that maintenance and investment are preferable targets to other areas, such as labor costs, for selective cost-cutting. TCA submits suggestions for additional reporting requirements, and other parties support this proposal.[240] API states that the experience of its member companies is that both quality and service of the interexchange carriers are superior to those of the LECs, and that the service gap is substantial and growing since the divestiture of AT&T.[241]

176. The LECs generally oppose any further expansion of service quality reporting. SNET argues that the Commission has already recognized service quality concerns by expanding our service quality and infrastructure

---

237 The Bureau's proceeding on service quality and infrastructure reporting is in progress. See Public Notice, DA 91-299, released March 8, 1991 (March 8 Public Notice).

238 See, e.g., TCA Petition at 8-25; ICA Petition at 8-11.

239 TCA argues that the Commission may have underestimated those incentives and overestimated the ability of existing federal and state oversight to protect against declining quality. TCA Petition at 3-4.

240 TCA Petition at 14-21; API Opposition at 8-10; Hawaii Reply at 3. API states that TCA suggests realistic service quality safeguards in its Appendix A, and that API's proposal of requiring the LECs to publish service quality objectives in their tariffs would be a significant stride. API Opposition at 7-8; TCA Petition, Appendix A.

241 API Opposition at 8-10. API attributes the difference to the competitive nature of the interexchange market, and commends TCA's proposals as being surrogates for competitive and marketplace realities.

monitoring, and that TCA calls for more regulation to correct a problem which has not been shown to exist.[242] The LECs urge that the Commission's requirements are adequate and, except for post-dial delay reporting, practicable. United requests that the Commission clarify that the service reporting requirements are limited to interstate services.[243] SNET suggests that concerns about service quality should be deferred to the supplemental proceeding to be initiated by the Common Carrier Bureau.[244]

177. The pleadings from user groups and interexchange carriers voice a generalized concern that a move away from fully distributed cost rate regulation, to price cap regulation, will provoke a degradation of the network and a falling off of service quality and infrastructure development as the LECs scurry to cut their costs and increase their profits. The LECs argue that this is untrue, and that allowing the network, their primary asset, to degrade, would be self-destructive and shortsighted. While we acknowledge the serious concerns of the challengers, we agree that a degradation of the network would be inimical to the operation of the system of incentives that underlies price cap regulation.

178. In the LEC Price Cap Order, the Commission reaffirmed our commitment to assuring the availability of high quality, innovative communications services, and to the development of the telecommunications infrastructure needed to provide those services. LEC Price Cap Order, 5 FCC Rcd at 6827, para. 332. One of the Commission's fundamental goals is to encourage the development of a competitive, innovative, and excellent American communications system. We believe that price cap regulation will serve even better than rate of return regulation to encourage the LECs to maintain and expand the excellence of the network. LECs have natural efficiency incentives to modernize the network: modern facilities increase capacity (and thus revenues) while decreasing maintenance (and thus costs). Further, LECs are encouraged to upgrade their equipment and facilities in order to provide a broad range of services at a reasonable range of rates, since their interstate revenues are to a large extent usage-sensitive. LECs must provide high quality service or their large customers will complain or will find other service providers. Finally, opportunities presented by incentive regulation for enhancing efficiency in the LEC industry include the opportunity to provide better incentives for innovation. By creating incentives for carriers

---

242 SNET Opposition at 4-5. SNET says that LECs must respond to large customers which demand good service, and that the LECs are penalized, through lost revenues, for lost minutes of use caused by call blocking or service outages from poor quality. SNET Opposition at 5.

243 United Petition at 7, citing LEC Price Cap Order, 5 FCC Rcd at 6828, para. 342.

244 SNET Opposition at 5-6.

to become more productive, incentive regulation generates powerful motives to innovate.

179. Despite our conviction that incentive regulation will stimulate LECs to maintain and increase the high level of service presently available, we decided in the LEC Price Cap Order to expand our data collection of service quality and infrastructure development indicators. In response to parties' expressed concerns, in the desire to accumulate a substantial database for our performance review, and in an abundance of caution, we have directed the Common Carrier Bureau to develop reporting requirements to allow monitoring of LEC service quality and infrastructure development. The Bureau has reviewed the pleadings submitted here and has engaged in informal discussions with numerous sources. The Bureau's March 8 Public Notice suggests reporting modifications that respond to these pleadings and discussions. It establishes a pleading cycle, and states the Bureau's intention to release a reporting requirements Order so that price cap LECs will file service quality and infrastructure reports by July 1, 1991. On reconsideration we are fine-tuning somewhat the expectations expressed in the LEC Price Cap Order, but we are affirming our general conclusions.

a. Post-dial delay

180. The Commission has defined post-dial delay (PDD) as the time between the dialing of the last digit and the response of a "winkback," or the acknowledgement of signal receipt, from the interexchange carrier. LEC Price Cap Order, 5 FCC Rcd at 6828, para. 344. Many commenters state that this definition is unclear or confusing.[245] Some LECs argue that industry standards have not been developed for PDD,[246] and several declare that they are not equipped to record PDD data as the LEC Price Cap Order defines the term.[247] Other LECs assert that the definition is ambiguous because the LEC Price Cap Order is unclear as to when the second point of measurement in the Commission's definition of PDD (i.e., the "response" from the interexchange carrier) actually occurs.[248]

---

245 See, e.g., US West Petition at 4.

246 US West Reply at 4; SNET Reply at 5; USTA Reply at 2; SWB Reply at 2.

247 See, e.g., United Petition at 8; GTOC Petition at 7; Bell Atlantic Petition at 5; SNET Petition at 9; Contel Petition at 4; Pactel Petition at 27; PRTC Opposition at 8; United Petition at 8; US West Petition at 5; US West Reply at 2-3; USTA Petition at 2-5.

248 See, e.g., NYNEX Petition at 5-6. NYNEX asserts that it records and time stamps the first wink for access billing purposes, but that this event is insufficient as a PDD measurement point. The second wink, NYNEX states, is not recorded or stamped by its switches. Accord, GTOC Petition at 11; US West Petition at 4, citing Signaling North American Dialing Plan, Section

181. Some LECs urge the Commission to eliminate the PDD reporting requirement.[249] They argue that sufficient remaining measurements exist to ensure LEC quality of service.[250] Others contend that PDD measurement is further complicated by the introduction of Signalling System 7 (SS7).[251] The LECs argue that development of PDD reports would be time-consuming and expensive, and would yield no appreciable benefit to the Commission or to the public.[252] They assert that the PDD data can be collected only by use of expensive sampling methods or by modification of the switches, both of which cause an undue burden on the LECs.[253]

182. MCI states, however, that the industry has already developed PDD standards, and that to reduce the alleged burden of collecting and reporting PDD data, the LECs could take a sample of each type of end office switch deployed in each of the LECs' study areas. MCI adds that a method exists to

---

6.12.51, Bell Communications Research Notes on the BOC Intra-LATA Networks, 1986.

249 NYNEX Petition at 5-6; PRTC Opposition at 8-9; SNET Petition at 8; Bell Atlantic Petition at 4; GTOC Petition at 6-18; United Petition at 8; Pactel Petition at 27; Contel Petition at 2; Rochester Opposition at 17 n.38. Others suggest that the PDD issue should be addressed in a separate proceeding. GTOC Opposition at 13-15; US West Petition at 5.

250 SNET Petition at 11; SWB Petition at 4; GTOC Petition at 8; NYNEX Petition at 6; USTA Reply at 1-2. Several parties note that PDD as the Commission defines the term is not a meaningful measure of LEC performance due to numerous factors beyond LEC control. USTA Petition at 3-6; Bell Atlantic Petition at 4-6; Pactel Petition at 27-30; SWB Petition 4; PRTC Opposition at 8-9; SNET Petition at 8-11; US West Reply at 3.

251 SS7 is a new technology that enables LECs to carry signalling information over a channel separate from the voice or data channel, thereby decreasing call set-up time. Contel states that any industry efforts to develop in-band PDD measurements would be inapplicable and eventually obsolete since SS7 signalling is done out of band. Contel Petition at 5. SWB asserts that measured call set-up time may even temporarily rise during the transition period to SS7 network technology. SWB Petition at 7.

252 See, e.g., Contel Petition at 3; NYNEX Petition at 5 n.**; United Petition at 8; Bell Atlantic Petition at 6; SNET Petition at 9-10; GTOC Petition at 8, 13-17; Contel Petition at 5.

253 See, e.g., Bell Atlantic Petition at 2; Contel Petition at 5; SNET Petition at 10; SWB Petition at 4-5; PRTC Opposition at 8-9; US West Reply at 4 n.9.

measure test calls by simulating live traffic, and that this method of measuring PDD would serve the Commission's purpose. MCI argues that LEC claims of impossibility and burdensomeness are not credible since one company will shortly be recording PDD data on live calls.[254] Allnet contends that PDD is a key measurement of switch overloading, and that the LECs are attempting to weaken important underlying consumer safeguards by seeking to eliminate PDD data collection.[255]

183. In the LEC Price Cap Order we established a simple definition of post-dial delay: the time between the dialing of the last digit by the end user, and the response of an acknowledgement wink from the interexchange carrier. LEC Price Cap Order, 5 FCC Rcd at 6828, para. 344.[256] In response, the LECs have submitted arguments that this definition is unclear or impracticable, and that the measurement and reporting of post-dial delay would involve extreme difficulty and expense, while yielding minimal benefit. They argue that our other service quality reporting requirements provide data

---

254 MCI Opposition at 33-34 (noting that Pactel had admitted it will soon be recording such data). Accord Allnet Reply at 4. D-ASPEN (Bellcore's Digital Automatic System for Performance Evaluation of the Network) is a sampling procedure that has been used in the past. Pactel argues it is not installing new systems specifically to measure PDD, but that the ability of the systems to report PDD is incidental to Pactel's purpose in installing the equipment. Pactel Reply at 9-10. USTA adds that other LECs do not have that capability, and that sampling does not necessarily provide useful data. USTA Reply at 3. USTA states that costs of sampling are extremely high and that exchange carriers moving to price caps should not be required to incur such costs since that would be an additional burden which is not needed to address any bona fide price cap concern. USTA Reply at 2-3; see also NYNEX Reply at 4; Bell Atlantic Petition at 6; Bell Atlantic Reply at 7; Pactel Petition at 28; United Petition at 7-8. But see MCI Opposition at 33, citing Southwestern Bell Telephone Company Revisions to Tariff F.C.C. No. 6, CC Docket No. 88-287, Order Designating Issues for Investigation, 4 FCC Rcd 2580, 2581 (Com. Car. Bur. 1989) (SWB Order). MCI declares that SWB, US West, and Pactel supplied PDD data in that investigation and fail to explain why reporting such data is more difficult under the LEC Price Cap Order. MCI Opposition at 33. SWB responds that the LEC Price Cap Order requests data that cannot be obtained, requires broader detail, and involves greater expenditures. SWB Reply at 3.

255 Allnet Reply at 4.

256 As we noted there, PDD is also known as "access time," or the interval that begins when the caller completes dialing the call and ends when the LEC has delivered the call to the carrier. See Provision of Access for 800 Service, 4 FCC Rcd 2824 (1989) (Database 800 Order) at 2840 n.26. At that time, the LEC receives a second, or "acknowledgement," wink from the carrier.

sufficient to monitor the same characteristics as would be monitored by post-dial delay data. Other parties, however, urge retention of this requirement.

184. We are persuaded that the measuring and reporting of post-dial delay using the D-ASPEN system would be so expensive and burdensome as to be unwarranted on a cost-benefit basis. We are reluctant, however, to remove the post-dial delay reporting requirement from our service quality reports, despite our confidence in our other service quality reporting requirements. We note that the Bureau is presently investigating service quality reporting requirements in some detail, and that its March 8 Public Notice solicits further comment on post-dial delay reporting. We note further that, in an ex parte presentation, one BOC suggests that information related to post-dial delay can be gleaned from data submitted in the ARMIS infrastructure reports.[257] In view of the Bureau's ongoing proceeding and its expertise in this technical area, we direct the Bureau to evaluate means of monitoring post-dial delay that are less burdensome than the D-ASPEN system. In particular, we ask the Bureau to investigate the feasibility of requiring price cap LECs to include in their service quality reports data with respect to post-dial delay based on calculations derived from facilities and routing data supplied in their infrastructure reports.

b. Other service quality measurements

185. Contel believes that the service quality reporting requirements we adopted in the LEC Price Cap Order will address concerns that price cap incentives will cause service degradation.[258] Others argue that the required reporting is inadequate. TCA asserts that the transmission quality parameters in the monitoring reports could sufficiently monitor voice circuit quality if they are modified to reflect consistent standards, and are disaggregated

---

257 Ex parte Statement of SWB, March 28, 1991. SWB asserts that call set-up time is essentially constant for each type of switch, type of signalling arrangement, type of trunking arrangement, type of interexchange service, and type of call. Thus, a finite number of combinations, each with its characteristic post-dial delay, can be calculated. See also Southwest Bell Telephone Co. et al., CC Docket No. 88-287 (Adjunct Devices Proceeding), NYNEX Direct Case, filed Apr. 21, 1989, at Exhibit 6. NYNEX estimates minimum and maximum post-dial delay by switch type. First, the call set-up components are identified, then a minimum and maximum time interval is assigned to each component based on switch design standards provided by Bellcore, then the intervals are totaled to obtain a sum for the entire call, and that total figure is adjusted to obtain a final estimate of post-dial delay.

258 Contel Petition at 3. Contel asserts that the semi-annual reports alone -- dial tone speed, transmission quality, and network blockage reports -- provide enough data for the Commission to monitor LEC network service quality. Contel Petition at 6.

geographically and by service, but that they are still inadequate to monitor data transmission quality.[259] TCA also suggests that LECs be required to include in their tariffs specifications of service quality levels they will provide.[260]

186. We have repeatedly expressed the importance we attach to service quality and infrastructure development, and we are committed to taking the steps necessary to further improve them. We have directed the Bureau to consider petitioners' arguments, and these questions are presently before the Bureau in its proceeding to specify the exact information collected and formats to be used in our monitoring of service quality and infrastructure development. We note that the Bureau has solicited comment on the matters of geographic, demographic, and service category disaggregation, data transmission indicators, the inclusion of service quality parameters in LEC tariffs, and definitions and explanations generally, in its March 8 Public Notice. We encourage interested parties to comment upon the costs and benefits of such steps. We also incorporate relevant comments from this proceeding in the Bureau's record.

c. Geographically disaggregated reporting

187. The LEC Price Cap Order requires that service quality data be filed at the study area level, and be disaggregated as to special access and switched access. LEC Price Cap Order, 5 FCC Rcd at 6830-31, paras. 359-360. LECs generally support study area data, and oppose any additional disaggregation of monitoring reports, such as reporting by exchange or by service category.[261] Several other parties disagree, charging that the LECs overstate the burdens and undervalue the benefits of exchange-by-exchange and service-specific reporting.[262] These parties argue that failure to differentiate between rural and urban as well as small and large consumers

---

259 TCA Petition at 20. TCA suggests that the requirements include overall measurements of circuit quality that address factors relevant to both voice and data transmission circuit quality, such as mean time between failures, and bit error rates. TCA Petition at 20-21. See also ICA Petition at 16-17; ICA Reply at 7-8; Boeing ex parte of February 21, 1991. We note that the Bureau's proposed reporting requirements, published with its March 8 Public Notice, include measures of data transmission quality.

260 TCA Petition at 14. See also Ad Hoc Petition at 24; API Opposition at 7-8; Boeing ex parte of February 21, 1991.

261 Bell Atlantic Opposition at 11; GTOC Opposition at 15-16; USTA Petition at 14.

262 See, e.g., TCA Reply at 7; API Opposition at 7-10.

could result in differing levels of service quality which would be masked by large aggregations of data.[263]

188. The question of geographic aggregation for service quality reporting has been addressed in previous stages of this proceeding. While some comment was stimulated, most parties did not oppose the proposed level of aggregation, and in the LEC Price Cap Order we established the study area as the relevant reporting unit. We stated there that we believed that reports based on study area data are specific enough to allow adequate monitoring of LEC performance, especially in conjunction with other service quality safeguards. LEC Price Cap Order, 5 FCC Rcd at 6830, para. 359. We delegated to the Chief, Common Carrier Bureau the responsibility for developing specific reporting requirements. In its proceeding, the Bureau may further fine-tune the reporting requirements, to address concerns raised in the reconsideration pleadings, including questions of geographic and service-level disaggregation. We direct the Bureau to balance the usefulness of service quality and infrastructure reports against the burden imposed upon price cap LECs to provide them. If the Bureau concludes that the level of geographic aggregation or service level detail should be adjusted, these and similar modifications are within the Bureau's delegated authority. To the extent that pleadings here are relevant to the Bureau's determinations, they are incorporated in the record of that proceeding.

d. Reporting disaggregated by service category

189. The LEC Price Cap Order requires service quality reporting that disaggregates switched and special access services, but does not mandate any further disaggregation of service types. Two parties request further service-level disaggregation in LEC service quality reporting. TCA contends that further disaggregation of reporting within each access category is warranted in order to deter migration of customers among same-category services.[264] The RBOCs generally oppose more disaggregated reporting.[265]

---

263 Hawaii Petition at 4; Hawaii Reply at 2-3; See also Florida Citizens Opposition at 6; TCA Petition at 16.

264 TCA Petition at 18, stating that migration, particularly between voice grade and high capacity special access services, has previously been a problem for TCA members. TCA argues that reporting on the service category level is not only necessary, but also practicable; TCA gives examples to support this assertion. Id., citing Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3084, 3096 (1990) (BOC ONA Reconsideration Order).

265 Indeed, Pactel suggests that the Commission determine on reconsideration that we will not require reporting disaggregated by type of access or, at a minimum, that we will have the Common Carrier Bureau determine that issue. Pactel Opposition at 38. Pactel argues that disaggregated reporting would be burdensome and of limited value since LECs' facilities are being used

190. Parties have raised concerns about service aggregation in service quality reporting at various stages in this proceeding; in response to those concerns, we stated in the LEC Price Cap Order that we would require that service quality reporting be separated to distinguish between switched access and special access. Requests for still further disaggregation are more properly considered in the Bureau's separate service quality proceeding. Accordingly, pleadings on that issue in this forum are incorporated in the record in that proceeding.

e. Standards

191. The Commission declined to establish national standards, reasoning that the existing high level of service quality, in combination with price cap incentives and state monitoring programs, negated any need for standards at the present time. LEC Price Cap Order, 5 FCC Rcd at 6829-32, paras. 350-371. The LECs agree, stating no standards or penalties are needed.[266] Some parties propose alternatives, including development of national standards, and establishment of enforcement mechanisms.[267]

192. We believe that the economic incentives included in the price cap plan, combined with the expanded service quality monitoring program, are adequate to maintain and improve service quality.[268] These parties have

---

increasingly to provide mixed switched and special access services.

266 USTA Opposition at 13-14; USTA Reply at 4; NYNEX Opposition at 21-22; Pactel Opposition at 33; SWB Opposition at 6-7; BellSouth Opposition at 26-27. USTA and BellSouth argue that if further safeguards are adopted the additional monitoring and administrative costs should be passed along to interexchange carriers or to ratepayers as exogenous cost adjustments in the PCI calculations. Pactel and BellSouth assert that price cap LECs are unlikely to jeopardize their network infrastructure by placing short-term profitability ahead of their long-term wellbeing through reduction in maintenance and investment, as that is their primary asset. BellSouth Opposition at 26-27; USTA Petition at 13-14; USTA Opposition at 14; Pactel Opposition at 33.

267 ICA Petition at 15-18, App. A.; TCA Petition at 10-14 (urging development of nationwide standards to be reflected in LEC access tariffs); TCA Petition at 22-24; Hawaii Petition at 3-4 (urging establishment of enforcement mechanisms); TCA Petition at 20-23 (suggesting that LECs at least be held responsible for failure to comply with their own standards).

268 We note, however, that this expression of our general belief regarding the adequacy of current incentives and service quality structures is not intended to circumscribe the decisionmaking options of the Common Carrier Bureau with regard to matters we are expressly delegating to the Bureau in this Order. For example, we have left for Bureau consideration and resolution

offered no new arguments in support of national standards, and we remain convinced that LECs have sufficient incentives to maintain service quality. Further, many manifestations of service quality decline are easily detectable by ratepayers. See LEC Price Cap Order, 5 FCC Rcd at 6830, paras. 356-357. Finally, we reiterate that the Commission will consider developing standards, sanctions, and other appropriate enforcement mechanisms if we become aware that those measures are required.

2. Infrastructure Development

193. The Commission also established reporting requirements to monitor LECs' infrastructure development.[269] We determined that infrastructure and service quality reports are to be included in ARMIS. LEC Price Cap Order, 5 FCC Rcd at 6828, 6829, paras. 342, 352. The reports currently filed in ARMIS are accounting reports, however, not service quality or infrastructure reports. ARMIS is located in and administered by the Accounting and Audits Division of the Bureau, while service quality and infrastructure are monitored by the Industry Analysis Division. While the new reports will be filed in ARMIS for convenience and accessibility, they will be in the purview of the Industry Analysis Division for purposes of monitoring and evaluation. Copies

---

the issue of whether reporting requirements should be further disaggregated below the switched and special access level. We expect the Bureau to exercise its judgment and reach conclusions on this and other service quality issues delegated to the Bureau based upon the record before it and its expertise regarding service quality issues. Bureau decisions on these matters will, of course, be subject to our further review.

269 In an annual filing, price cap LECs will report on: (1) number of central offices by type of equipment (stored program control, digital, equal access, Signalling System 7, integrated switched digital network); (2) number of access lines by type of office (same as above); (3) local loop transmission facilities by type of available channel (baseband, analog, digital, fiber, other); (4) local loop transmission facilities by type of channels in service (same as above); (5) interoffice transmission facilities by type of channels in service (circuits: baseband, analog, digital; carrier links: copper analog or radio, digital copper or radio, or fiber); (6) copper and fiber pairs available at main frames; sheath miles; fiber to users; and (7) gross construction in millions of dollars, including (a) number of access lines, (b) access lines gained, and (c) dollars per access line gained. LEC Price Cap Order, 5 FCC Rcd at 6829, para. 351. Virtually no comments were filed on these reporting requirements. The particulars of these requirements will be established in the Bureau's proceeding.

will be available both through ARMIS and through the Industry Analysis Division. The Bureau's proceeding will further clarify filing requirements.

B. Monitoring and Performance Review

194. Because price cap sharing and adjustment mechanisms are based on total interstate rate of return for price cap services, the Commission removed from ARMIS and Form 492 reports all rate of return data below the total interstate level for price cap LECs. Other data will still be collected at the Part 69 rate element level for monitoring purposes. The Commission will begin its performance review of price cap LECs three years after the initiation of the plan, and will consider LEC prices, earnings, service quality, and technological progressiveness. LEC Price Cap Order, 5 FCC Rcd at 6832-35, paras. 372-394.

195. Some parties request that the Commission clarify that detailed reporting requirements will continue for Form 492 and ARMIS reports to allow the Commission and interested parties to evaluate LEC behavior, protect against discrimination and cross-subsidization, and monitor other aspects of the plan.[270] ICA states that earnings levels are key to the application of the sharing plan that accompanies the price cap plan, and that more detailed cost reporting under ARMIS should be available to check on the possible lack of sharable earnings.[271]

196. Other parties object to our removal of the calculation of rate of return reporting data below the total interstate level.[272] ICA explains

---

270 MCI Petition at 18-20; ICA Petition at 8-11; Ad Hoc Petition at 15; TCA Petition at 8-10. Several petitioners request that the Commission assure that LEC reporting requirements will remain sufficiently detailed to allow the Commission to fulfill our regulatory and statutory responsibilities. MCI Petition at 20; ICA Petition at 8-11; TCA Opposition at 9-10; IDCMA Opposition at 16-17; Metropolitan Opposition at 3-6; Ad Hoc Reply at 7-8.

271 ICA Petition at 10; ICA Reply at 6-7. ICA suggests, for example, that depreciation rate increases would not affect the LEC's PCI but would be reflected in ARMIS and Form 492 reports, and suggests that detailed data would ensure that LECs do not reduce sharable earnings by depreciation rate increases that might otherwise go undiscovered. ICA Petition at 10.

272 Ad Hoc asserts that disaggregated earnings reporting is necessary because the price cap plan is not designed to ensure that rates for individual services will be reasonable, with the possible exception of the fourth-year performance review. In the absence of data revealing service category rates of return, Ad Hoc asserts, the performance review will not detect instances in which carriers operating under price caps are earning excessive returns on individual services. Ad Hoc Petition at 16-17. See also IDCMA Opposition at 16-17. IDCMA adds that the availability of data concerning the costs of the LECs' individual, unbundled basic offerings will be more important as the LECs' ONA plans are implemented and become subject to price cap regulation.

that the requirement that exogenous factors be reflected in the PCIs for each basket in a cost causative manner dictates that ARMIS reporting should remain sufficiently detailed to assess the particular cost effects of these changes.[273] SWB supports the Commission's decision to undertake a performance review after the third year of price cap regulation, and suggests that remaining concerns be addressed during that review.[274]

197. The LECs generally urge the Commission to retain rate of return calculation reporting requirements as described in the LEC Price Cap Order.[275] Rochester and USTA argue that these reports and Form 492 requirements under the Order are sufficient to ensure compliance with price cap rules, and that the record supports Commission decision to refrain from imposing additional rate of return calculation reporting requirements.[276] Some LECs argue that maintenance of disaggregated rate of return calculation data would be burdensome.[277] SNET adds that small and mid-sized carriers would be discouraged from opting for price caps, and that all price cap LECs would be placed under a form of dual regulation, if disaggregated rate of return calculation data were required.[278]

---

273 ICA Petition at 9; ICA Reply at 6-7.

274 SWB Opposition at 3. MCI suggests, as it has in previous stages of this proceeding, that earnings be calculated on the basket level. MCI Petition at 20; see also ICA Petition at 8; Ad Hoc Petition at 15-17; IDCMA Opposition at 16. Ad Hoc admits that the burden imposed on carriers will be greater than if all reporting were at the total interstate level, but argues that the balance between ratepayer and shareholder interests must be struck so that avoidance of exploitative charges has more weight than an administrative burden. Ad Hoc Reply at 8-9.

275 See, e.g., Rochester Opposition at 18-20; USTA Opposition at 24; SNET Opposition at 2-3.

276 Rochester Opposition at 18-19; Rochester Reply at 2 n.2; USTA Opposition at 24. They argue that additional rate of return calculation data is not needed in light of the price cap plan's structure of baskets, service categories, band limitations, and sub-indices, which are sufficient to address any discrimination, cross-subsidization or other monitoring concerns, while promoting economic efficiency. SNET Opposition at 3; NYNEX Opposition at 21; Rochester Opposition at 18-19; NYNEX Reply at 5-6.

277 BellSouth Opposition at 24; USTA Opposition at 24; SWB Opposition at 10-11.

278 SNET Opposition at 2-3.

198. In adopting price cap regulation for LECs, we stated that we acknowledged our responsibility not only to shape the plan carefully, but also to monitor its application and results to guard against unintended and unanticipated effects or problems. In order to accomplish this and to compile data sufficient to our purposes in conducting a performance review beginning after three years of LEC price cap regulation, we determined to retain our detailed reporting system as represented by ARMIS and Form 492 reports. The single modification, made in recognition of our move away from strict cost-based analysis to more flexible price regulation, and acknowledging the reliance of our sharing and adjustment mechanisms on LECs' overall interstate earnings levels, is the removal from ARMIS and Form 492 reports of all rate of return calculation data below the total interstate level. We also determined, however, that it was important to continue to collect all other data at a disaggregated, Part 69 rate element level. This level of detail is helpful in separations matters and in questions of regulated/nonregulated allocations. We concluded that the removal from ARMIS of any of this detailed data would detract from the usefulness, consistency, and reliability of the system as a whole.

199. We reject the assertion that this collecting of data constitutes "double" regulation; as we clearly stated in the LEC Price Cap Order, the ARMIS and Form 492 data collections will be used for monitoring and evaluation purposes only. This data does not serve a ratemaking purpose,[279] and we do not insist or expect that results under price caps will correspond exactly to results under the previous system. ARMIS and FORM 492 data will permit implementation of the sharing and adjustment mechanisms. The transition from rate of return to price cap regulation necessarily entails some overlap, at least initially, of the two systems. As discussed in Part II.D., supra, the sharing mechanism relies on a general rate of return evaluation. We have limited and modified this evaluation, however, to decrease its intrusiveness and increase its harmonization with the price caps philosophy.

200. We also reject requests that we expand reporting requirements, for example through further disaggregation. We do not believe that additional reporting requirements are needed to evaluate whether rates under price caps are just and reasonable in light of their costs and profits. Excessive returns on individual services are monitored through use of the filing requirements for above-band pricing proposals and other price cap mechanisms. The sharing and adjustment mechanisms are based on total interstate rate of

---

279 See LEC Price Cap Order, 5 FCC Rcd at 6833, para. 380. While we have noted that disaggregated ARMIS data is not intended to serve ratemaking purposes, it is important to note that, if our monitoring of allocations between regulated and non regulated activities, or between state and interstate jurisdictions, discloses that these allocation calculations have not been done correctly, the correction of these calculations may have an impact on LECs' interstate access rates.

return, and that is the only rate of return data used in the price cap plan. Accordingly we deny petitions for reconsideration that request either expansion or reduction of these reporting requirements.

VII. COMPLAINTS

201. In the LEC Price Cap Order, we said that we would continue to rely on the Section 204 investigation and Section 208 complaint processes to help ensure just, reasonable, and non-discriminatory rates for price cap LECs, although one type of complaint would not lie -- i.e., would not be grantable. The sharing mechanism was adopted, inter alia, under the Commission's Section 205(a) prescription authority, based upon overall company earnings. In light of our prescription of this mechanism, we indicated that "complaints claiming that overall company earnings that comply with the sharing mechanism are excessive in view of costs will not lie." LEC Price Cap Order, 5 FCC Rcd at 6836, para. 406. Other causes of action could continue to be pursued in complaints, for example, that a rate is discriminatory, that a LEC is not in compliance with the sharing mechanism, or that particular rates of a LEC permitted to charge above-cap rates are unjust and unreasonable in light of the relevant costs and profits. Id.

202. Some pleadings argue that the Commission does not have the power to limit customers' rights to bring actions under Sections 206-209 of the Communications Act.[280] Those sections do not confer a right to base a complaint upon a theory of liability that is inconsistent with a prior Commission determination. We have determined that overall earnings produced by rates that comply fully with price cap requirements will be just and reasonable. Accordingly, a complaint against a price cap carrier that is based solely upon the theory that rates are unjust and unreasonable because the rates produced such earnings would be dismissed. This approach is no different than under rate of return regulation, where a complaint is dismissed if it argues that a carrier's overall earnings are unjust and unreasonable even though they comply with the prescribed rate of return. See Nader v. FCC, 520 F.2d at 202-03. Indeed, the parties challenging our authority appear to concede that this limited foreclosure of complaints is legally permissible. No other complaints are foreclosed.

203. Several LECs urge that we reconsider or clarify a reference to one additional basis upon which complaints may continue to be filed, "that particular rates are unjust and unreasonable in light of the relevant costs and profits." LEC Price Cap Order, 5 FCC Rcd at 6836. Bell Atlantic and US West assert that allowing overearnings complaints with respect to individual products and services is at odds with the underlying logic of the price cap

---

280 AT&T Opposition at 21-22; MCI Reply at 30-32; Ad Hoc Opposition at 2-7; IDCMA Opposition at 3-17. IDCMA also dismisses LEC arguments of "double regulation," stifling innovation, etc.

concept and will undoubtedly lead to a flood of product-specific complaints.[281] US West contends that "there is no such thing as an unlawful rate based on overearnings in a price cap environment when the initial price is just and reasonable and all price cap rules are adhered to in subsequent tariff filings."[282] Moreover, these LECs argue that it would be unlawful for the Commission to allow the complaint process to be used to require customer refunds of individual rates with high earnings, under the precedent of AT&T v. FCC, 836 F.2d 1386 (D.C. Cir. 1988), which vacated automatic rate of return refund rules that eliminated earnings "peaks" but left carriers to absorb earnings "valleys."[283]

204. Other LECs do not deny that complaints based upon individual rates can be filed, but view the statement in the Order as leaving it unclear how the Commission will treat costs and profits in complaint proceedings,[284] or as implying a continued reliance on the fully distributed cost methodologies of rate of return regulation.[285] USTA, BellSouth, and Ameritech contend that one of the goals of price cap regulation is to eliminate the requirement that LECs adhere to fully distributed cost. They argue, however, that if the Commission were to rule favorably on a complaint alleging that a rate was not consistent with fully distributed cost, or that a rate was unfair because one basket earned more than others, the LECs would be compelled to price services based on fully distributed costing principles and undercut the single productivity factor of the price cap plan and its incentives for more efficient pricing.[286] Similarly, Pactel requests that the Commission clarify that certain causes of action under rate of return regulation do not lie under price caps, including earnings-based complaints against individual rates (as

---

281 US West Petition at 9; Bell Atlantic Petition at 2-4.

282 US West Petition at 9.

283 Bell Atlantic Petition at 4; US West Petition at 9. In its reply, US West appears to have shifted its position. While contending that overearnings complaints would present legal "problems" and administrative burdens, US West states that the Commission can avoid addressing the legal issues by announcing that it will exercise its discretion not to allow refunds associated with past "overearnings" on specific services, and adjust rates judged unlawful only on a prospective basis. US West asserts that "This approach preserves the integrity of the price cap plan and in no way infringes on complainants' rights under the Communications Act." US West Reply at 7.

284 USTA Petition at 16.

285 BellSouth Petition at 12-13; Ameritech Petition at 9-12.

286 Ameritech Petition at 9-12; USTA Petition at 15-17; BellSouth Petition at 12-14.

long as the LEC's rates are below the caps) and complaints that rates are not fully distributed cost-based.[287] In a more limited request, SWB states that fully distributed cost cost support should not be required to defend complaints against individual rates complying with price cap rules.[288]

205. Other parties oppose the LEC arguments or request their own clarifications. They deny that AT&T v. FCC precludes such complaints under price cap regulation, arguing that the case stands for the proposition that the Commission may not order automatic refunds in a manner that tends to prevent carriers from earning the return needed to attract capital. They assert that damages in a complaint would not be automatic, but would be assessed only after consideration of justness and reasonableness on a case-by-case basis.[289] Moreover, they contend that there is no reason to resolve this issue now, and that the scope of complaint proceedings should be determined if and when such complaints are filed.[290]

206. It remains this Commission's view that the complaint process is an important tool in ensuring just, reasonable, and non-discriminatory rates under price cap regulation. As petitioners generally recognize, our prescription of a mechanism to share specific levels of LEC earnings precludes complaints founded on overall LEC earnings, provided the LEC complies with that mechanism. The possibility remains, however, that rates for specific services may be set at unreasonable levels, or be unlawful in other ways. Compliance with the price cap rules does not necessarily make this impossible. The complaint process provides the procedural vehicle to deter and correct such infractions on behalf of LEC customers and the public, and we find no adequate support for the absolutist view that the logic of price caps requires the barring of all such complaints. Price cap LECs are furnished with substantial incentives and flexibility to become more efficient both in their operations and their pricing. They should be able to respond to these incentives while maintaining reasonable rates for their services.[291] We therefore adhere to the decision we made in the LEC Price Cap Order that complaints claiming simply that overall earnings are too high will not lie, as long as the carrier is correctly administering the sharing requirements.

---

287 Pactel Reply at 6.

288 SWB Reply at 6.

289 IDCMA Opposition at 11-12; AT&T Opposition at 23 n.*.

290 AT&T Opposition at 20.

291 We cannot agree with the view in US West's reply that correcting rates only prospectively in no way infringes the rights of complainants who paid those rates during a period in which they are later found to have been unlawful.

207. We also believe it is neither necessary nor desirable to establish or preclude specific benchmarks for evaluating when rates are within a reasonable range under price cap regulation, including benchmarks such as fully distributed cost and specific levels of earnings. Price cap LECs provide a wide and constantly expanding range of services in widely varying circumstances. Complainants should be free to present whatever evidence is relevant to assessing whether rates are reasonable in each case, just as the LEC should be free to present evidence relevant to its defense of those rates under price caps. The court's remand of automatic rate of return-based refunds in AT&T v. FCC is irrelevant to issues of damages due under a complaint lodged against a LEC.[292]

VIII. ORDERING CLAUSES

208. The rules adopted here revising tariff filing requirements and the adjustment formulas will be effective June 30, 1991, as specified below, in order to implement these revisions prior to the July 1, 1991 tariff effective date. We find good cause to make these rules effective on less than 30 days' notice after publication in the Federal Register. See 5 U.S.C. § 553(b)(B). These revisions are necessary to insure that the substantial benefits of the price cap plan to the public are maximized. If these rules are not in effect when the price cap tariffs take effect on July 1, 1991, the benefits resulting from these rules will be delayed for a full year after that filing, or until July 1, 1992. Further, the rule revisions adopted here require only minor revisions to the companies' price cap filings submitted April 2, 1991, so that the companies required to take action within less than 30 days from Federal Register publication have adequate time to do so.

209. Accordingly, IT IS ORDERED, pursuant to Sections 151, 154(i) and (j), 201-205, 303(r), and 405 of the Communications ACt, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), and 405, that the petitions for reconsideration, partial reconsideration and/or clarification filed in this proceeding ARE DENIED, except as provided herein.

210. IT IS FURTHER ORDERED that, pursuant to Sections 154(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), 405, and Section 553 of Title 5, United States Code, that Sections 61.45(d) and 69.105(b) of this Commission's Rules, 47 C.F.R. §§ 61.45(d) and 69.105(b), ARE AMENDED as set forth in Appendix B of this Order EFFECTIVE JUNE 30, 1991.

---

292 To address MCI's request for clarification, we would advise complainants that there is no purpose to their including invalid causes of action in a complaint, but if they do so dismissal of that cause of action will not automatically require dismissal of all other causes of action in the same complaint. See Section 1.728 of the Commission's Rules, 47 C.F.R. § 1.728.

211. IT IS FURTHER ORDERED, pursuant to Sections 154(i) and (j), 201-205, 303(r), and 405 of the Communications Act, 47 U.S.C. §§ 151, 154(i) and (j), 201-205, 303(r), and 405, that Sections 61.48(d), 61.49(g), 65.600(d), and 65.703 of this Commision's Rules, 47 C.F.R. §§ 61.48(d), 61.49(g), 65.600(d), and 65.703, ARE AMENDED as set forth in Appendix B of this Order EFFECTIVE 30 days after publication in the Federal Register.

212. IT IS FURTHER ORDERED that the motions to accept pleadings exceeding the applicable page limits filed by MCI Telecommunications Corporation and the BellSouth Telephone Companies, and the motion to supplement the petition for reconsideration out of time filed by Citizens, ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Parties Filing Pleadings
LEC Price Cap Order Reconsideration Proceeding

Below are listed the parties filing pleadings in this proceeding. Also listed are the abbreviated names by which these parties are indicated in the Reconsideration Order.

Petitions (filed Nov. 21, 1990):

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Ameritech Operating Companies (Ameritech)
American Telephone and Telegraph Company (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cincinnati Bell Telephone Company (CBT)
Citizens Utilities Company of California (Citizens)
Contel Corporation (Contel)
D.C. Public Service Commission (D.C. PSC)
GTE Telephone Operating Companies (GTOC)
State of Hawaii (Hawaii)
International Communications Association (ICA)
MCI Telecommunications Corporation (MCI)
Metropolitan Fiber Systems (Metropolitan)
National Exchange Carrier Association (NECA)
National Telephone Cooperative Association (NTCA)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Pacific Bell and Nevada Bell (Pactel)
Rochester Telephone Corporation (Rochester)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWB)
Tele-Communications Association (TCA)
Telephone and Data Systems (TDS)
Telephone Utilities Exchange Carrier Association (TUECA)
United Telephone Systems Companies (United)
United States Telephone Association (USTA)
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West)

Oppositions (filed December 21, 1990):

Ad Hoc
Ameritech
American Petroleum Institute (API)
Association for Local Telecommunications Services (ALTS)
AT&T

Bell Atlantic
BellSouth -- also Motion to Waive Page Limitation
Central Telephone Company (Centel)
Citizens -- also Motion for Leave to Supplement Petn. for Recon. Out of Time
D.C. PSC
State of Florida (Florida)
GTOC
ICA
Institutional Communications Company (ICC)
Independent Data Communications Manufacturers Association, Inc. (IDCMA)
MCI -- also Motion to Waive Page Limitation
Metropolitan
National Association of State Utility Consumer Advocates (NASUCA)
NYNEX
Pactel
Puerto Rico Telephone Company (PRTC)
Rochester
SNET
SWB
TCA
USTA
US West

Replies (filed January 8, 1991):

Ad Hoc
Allnet Communications Services, Inc. (Allnet)
API
AT&T
Bell Atlantic
BellSouth -- also Motion to Waive Page Limitation
CBT
D.C. PSC
Hawaii
ICA
MCI -- also Motion to Waive Page Limitation
Metropolitan
NASUCA
NECA
NYNEX
PacTel
Rochester
SNET
SWB
TCA
TDS
United
USTA
US West

APPENDIX B

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Parts 61, 65, and 69, are amended as follows:

PART 61 -- TARIFFS

1. Section 61.45 is amended by revising paragraph (d)(1)(ii), deleting the final period, adding paragraph (d)(1)(viii), and revising paragraphs (d) (2) and (3) as follows:

§ 61.45 Adjustments to the PCI for Local Exchange Carriers

* * * * *

(d) * * *

* * * * *

(1) Subject to further order by the Commission, those exogenous changes shall include cost changes caused by ... (ii) such changes in the Uniform System of Accounts as the Commission shall permit or require .... ; and (viii) inside wire amortizations.

(2) Local exchange carriers specified in § 61.41(a)(2) or (a)(3) shall also make such temporary exogenous cost changes as may be necessary to reduce PCIs to give full effect to any sharing of base period earnings required by the sharing mechanism set forth in the Commission's Second Report and Order in Common Carrier Docket No. 87-313, FCC 90-314, adopted September 19, 1990. Such exogenous cost changes shall include interest, computed at the prescribed rate of return, from the day after the end of the period giving rise to the adjustment, to the midpoint of the period when the adjustment is in effect.

(3) Local exchange carriers specified in § 61.41(a)(2) or (a)(3) shall, in their annual access tariff filing, recognize all exogenous cost changes attributable to modifications during the coming tariff year in the obligations specified in § 61.45(d)(1)(iv) as well as those changes attributable to alterations in their Subscriber Plant Factor and the Dial Equipment Minutes factor, and completions of inside wire amortizations and reserve deficiency amortizations.

2. Section 61.48 is amended by redesignating paragraph (d) as paragraph (d)(1), and adding new paragraph (d)(2) to read as follows:

§ 61.48 Transition rules for price cap formula calculations

* * * * *

(d)(2) Carriers electing price cap regulation under Section 61.41(a)(3) in a year after 1991 shall file initial price cap tariffs not later than April 2 of the year of election, to be effective on July 1 of the year of election. Each PCI, API, and SBI shall be assigned an initial value prior to adjustment of 100, corresponding to the costs and rates in effect as of January 1 of the year of election.

3. Section 61.49 is amended by redesignating paragraph (g) as paragraph (g)(1), revising the last sentence of paragraph (g)(1), and adding new paragraph (g)(2) to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation.

(g)(1) * * *

Each carrier making such a tariff filing must, at the time the new service is incorporated into the price cap index, submit data sufficient to make the API and PCI calculations required by §§ 61.46(b) and 61.44(c), and, as necessary, to make the SBI calculations provided in §§ 61.47 (b) or (c).

(2) In addition to the requirements of Section 61.49(g)(1), each tariff filing submitted by a local exchange carrier specified in § 61.41(a)(2) or (3) that introduces a new service that will later be included in a basket must be accompanied by cost data sufficient to establish that the new service will not recover more than a just and reasonable portion of the carrier's overhead costs.

PART 65 -- INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

4. Section 65.600 is amended by redesignating paragraph (d) as paragraph (d)(1), revising paragraph (d)(1), and adding paragraph (d)(2) to read as follows:

* * * * *

(d)(1) Each local exchange carrier or group of affiliated carriers subject to §§ 61.41 through 61.49 of this chapter shall file with the Commission within three (3) months after the end of each calendar year a report of its total interstate rate of return for that year. Such filings shall include a report of the total revenues, total expenses and taxes, operating income, and the rate base. Reports shall be filed on the appropriate form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and

information requested in the currently effective form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

(2) Each local exchange carrier or group of affiliated carriers subject to §§ 61.41 through 61.49 of this chapter shall file with the Commission within fifteen (15) months after the end of each calendar year a report reflecting any corrections or modifications to the report filed pursuant to paragraph (d)(1) above. Reports shall be filed on the appropriate form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

5. Section 65.703 is revised by deleting paragraph (h).

PART 69 -- ACCESS CHARGES

6. Section 69.105 is amended by revising paragraph (b)(2)(ii) as follows:

§ 69.105 Carrier Common Line

* * * * *

(b) * * *

* * * * *

(2) For association Carrier Common Line tariff participants, (i) the premium originating Carrier Common Line charge shall be one cent per minute, except as described in Section 69.105(b)(3), and (ii) the premium terminating Carrier Common Line charge shall be computed as follows: (A) for each telephone company subject to price cap regulation, multiply the company's proposed premium originating rate by a number equal to the sum of the premium originating base period minutes and a number equal to 0.45 multiplied by the non-premium originating base period minutes of that telephone company; (B) for each telephone company subject to price cap regulation, multiply the company's proposed premium terminating rate by a number equal to the sum of the premium terminating base period minutes and a number equal to 0.45 multiplied by the non-premium terminating base period minutes of that telephone company; (C) sum the numbers computed in (A) and (B) for all companies subject to price cap regulation; (D) from the number computed in (C), subtract a number equal to one cent times the sum of the premium

originating base period minutes and a number equal to 0.45 multiplied by the non-premium originating base period minutes of all telephone companies subject to price cap regulation, and; (E) divide the number computed in (D) by the sum of the premium terminating base period minutes and a number equal to 0.45 multiplied by the non-premium terminating base period minutes of all telephone companies subject to price cap regulation.

(3) If the calculations described in § 69.105(b)(2) result in a per minute charge on premium terminating minutes that is less than one cent, both the originating and terminating premium charges for the association CCL tariff participants shall be computed by dividing the number computed in (C) by a number equal to the sum of the premium originating and terminating base period minutes and a number equal to 0.45 multiplied by the sum of the non-premium originating and terminating base period minutes of all telephone companies subject to price cap regulation.

Statement
of
Commissioner Ervin S. Duggan

Concurring in Part, Dissenting in Part

In Re: Policy and Rules Concerning Rates for Dominant Carriers
(CC Docket No. 87-313), Order on Reconsideration

Last September, I dissented on one small part of our initial order adopting price caps for local exchange telephone companies. I had reservations about the common line formula that the majority chose--- and because the Commission today chooses not to reconsider its choice of a common line formula, I will again dissent on that portion. As I said in my September statement, I question that formula because it gives the companies, rather than ratepayers, the full benefit of growth in demand over common lines. The formula could result in carrier common line rates under price caps that are higher than they would have been under rate of return regulation.

Today, however, I want to emphasize my support for this new endeavor, rather than any residual reservations I may have.

Today we launch a great undertaking: we reaffirm the adoption of price caps for local exchange telephone companies. Thus this Commission enters into a hopeful and promising partnership with the telephone companies--- a partnership that I have every reason to believe will bear fruit in greater innovation, greater efficiency, and greater investment in new technology.

By adopting incentive regulation, we have offered the local exchange companies a challenge--- to perform in a way that they have never had the incentive to do before. I'm excited about the possibilities. Incentive regulation, in my judgment, has the potential to advance this industry and to fundamentally improve the way that telephone companies do business.

Some people, including me, have occasionally voiced concerns about this new venture. They ask, for example, whether telephone companies will maintain high service quality levels under price caps. Those are serious concerns. But one of the FCC's primary responsibilities is to ensure that the high quality phone service we take for granted continues. Undeniably, price caps will provide incentives to cut costs. We need to be sure that cost-cutting measures do not cut into service quality or network investment--- and we will do that. That is why we have asked the Common Carrier Bureau to determine what data we will need to monitor service quality and investment and to ensure that no degradation occurs.

Three items in particular seem worthy to me of comment as that monitoring proceeding goes forward.

First, it appears to me that we would benefit from receiving data that is broken down by service category and by geographic area. That would help the Commission learn whether cost-cutting measures under price caps were

disproportionately affecting rural areas or services that face little competition.

Second, I hope parties will comment on the proposal that carriers should include service quality standards or goals in their tariffs. One benefit of having standards in the tariffs would be to enable customers and the Commission to measure a company's service quality against that of other carriers and against general industry performance. I wonder whether this might be a useful approach.

Third, all of us will watch with great interest, hoping that price caps does indeed provide incentives for investment in important technologies like signalling system 7.

Our monitoring of service quality and network investment is part of our responsibility to ensure that the incentives we have created are working as we have hoped. We have something else going for us: These companies have given the public the best telephone service in the world. They have a great tradition. Today we have every reason to believe that that tradition and these new incentives will work together to create a great new future for these companies and for American consumers.

###

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91-116
38146

In the Matter of	)	
	)	
Policies and Rules Concerning Operator Service Providers	)	CC Docket No. 90-313
	)	
	)	RM-6767

REPORT AND ORDER

Adopted: April 9, 1991 ; Released: April 15, 1991

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
INTRODUCTION	1
BACKGROUND	2 - 5
DISCUSSION AND DECISIONS	6 - 67
Section 64.708 - Definitions	7 - 23
Section 64.703 - Consumer Information	24 - 41
Section 64.704 - Prohibition on Call Blocking	42 - 46
Section 64.705 - Restrictions on Charges	47 - 53
Section 64.706 - Emergency Calls	54 - 62
Section 64.707 - Public Dissemination of Information	63 - 67
Section 68.318 - Equipment Capabilities	68 - 70

FINAL REGULATORY FLEXIBILITY ANALYSIS 71 - 74

ORDERING CLAUSES 75 - 78

I. INTRODUCTION

1. With this Report and Order, we amend Parts 64 and 68 of our rules to implement provisions and establish policies and standards of the Telephone Operator Consumer Services Improvement Act of 1990.[1] This action establishes rules for operator service providers (OSPs) and call aggregators regarding consumer information, call blocking, restrictions on certain charges, and equipment capabilities. In addition, we establish minimum standards for the handling of emergency calls and adopt requirements for the public dissemination by OSPs of information about the operator services industry.

II. BACKGROUND

2. On June 14, 1990, this Commission adopted the initial Notice of Proposed Rule Making in CC Docket No. 90-313[2] in response to a petition for rule making filed by the National Association of Regulatory Utility Commissioners (NARUC).[3] In the NPRM, we proposed specific rules aimed at solving problems in the operator services industry that had persisted despite previous Commission action and we asked interested parties to express their views on a number of related issues.[4]

3. During the first week of October 1990, Congress passed the Operator Services Act, which the President signed into law shortly thereafter. The purpose of the Operator Services Act is "to protect consumers who make interstate operator services calls from pay telephones, hotels, and other public locations against unreasonably high rates and anticompetitive practices."[5] Under the Act, this Commission must, inter alia, conduct a

---

1 Pub. L. No. 101-435, 104 Stat. 986 (1990) (to be codified at 47 U.S.C. § 226) ("Operator Services Act" or "Act"). The text of the Act, in relevant part, is attached as Appendix B.

2 Policies and Rules Concerning Operator Service Providers, Notice of Proposed Rulemaking, 5 FCC Rcd 4630 (1990) (hereinafter NPRM). A full discussion of the development of the operator services industry and the proceedings related to operator service issues is contained in the NPRM at 4630-4631.

3 See Petition of the National Association of Regulatory Utility Commissioners, RM-6767 (filed April 17, 1989).

4 Id. at 4631-35, 4637-38 (these related issues included double branding, charging for unanswered or uncompleted calls, and standards for the handling of emergency calls).

5 S. Rep. No. 439, 101st Cong., 2d Sess. 1 (1990); see also H.R. Rep. No. 213, 101st Cong., 1st Sess. 2 (1989) ("The purpose of [the Act] is to protect telephone consumers against unfair prices and practices of some operator service providers (OSPs), yet allow the legitimate companies in the industry the opportunity to compete in the market.").

"general" rule making proceeding to prescribe regulations that will implement statutory provisions and establish certain standards and policies, and a monitoring/reporting proceeding that will ultimately result in three reports to Congress.[6] On December 21, 1990, we released a Further Notice of Proposed Rule Making[7] in order to: (1) "initiate" the general rule making and monitoring/reporting proceedings required by the Operator Services Act;[8] (2) propose the required rules; (3) invite any additional comments that are necessary beyond those submitted in response to our initial NPRM in CC Docket No. 90-313; (4) solicit such further information as is necessary to ensure that the objectives of the Act are satisfied;[9] and (5) declare that, under the Act, the access and payphone compensation issues must be considered in a separate proceeding.[10] The rules proposed in the FNPRM supplanted those proposed in the initial NPRM.[11]

4. In addition, Section 226(h)(3) of the Operator Services Act directs the Commission to initiate a proceeding to determine whether the regulatory objectives specified in Section 226(d)(1) of the Act are being achieved and to report our findings to Congress. The objectives of the Act are to ensure that consumers are protected from unfair and deceptive practices relating to their use of operator services to place interstate long distance calls and, second, to ensure that consumers have the opportunity to make informed choices in making such calls. Toward this end, the Act directs the Commission to monitor OSP rates, complaints filed against OSPs, various costs of providing operator service, innovations in the provision of operator services, and compliance with the requirements of the Operator Services Act. The FNPRM initiated this proceeding as Phase II of this docket and proposed to require OSPs to file reports to assist us in preparing the reports

---

6 47 U.S.C. § 226(d), (h)(3).

7 Policies and Rules Concerning Operator Service Providers, Further Notice Of Proposed Rule Making, 6 FCC Rcd 120 (1990) (hereinafter "FNPRM"). Comments were due by January 22, 1991, with reply comments due by February 6, 1991. The monitoring/reporting proceeding will be conducted in Phase II of this docket.

8 47 U.S.C. § 226(d)(2), (h)(3)(A).

9 See id. § 226(h)(3)(A).

10 See id. § 226(e). This proceeding has been initiated. See Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Notice of Proposed Rule Making, CC Docket No. 91-35, FCC 91-53, 56 Fed. Reg. 11,136 (1991) (hereinafter Access/Compensation NPRM).

11 To the extent comments in the NPRM were relevant to the proposals in the FNPRM, they were considered. Comments that went to proposals in the NPRM that were not subsequently proposed in the FNPRM are moot and were not considered. Comments made in the NPRM that are relevant to issues raised in the Access/Compensation proceeding will be considered in that docket.

required by the Act.[12] We delegate to the Chief, Common Carrier Bureau, authority to impose such reporting requirements as the Bureau shall deem necessary to fulfill the obligations imposed by Section 226(h)(3)(B) of the Act.

5. In response to the NPRM, over 400 parties filed comments and reply comments. In response to the FNPRM,[13] over 50 parties filed comments and reply comments. A list of all parties is contained in Appendix A. The Commission is required by the Operator Services Act to complete this rule making within 210 days of the statute's enactment, that is by May 15, 1991.

III. DISCUSSION

6. The majority of commenters agreed with the rules as proposed by the Commission in the FNPRM. With the exception of rules for which clarification or modification was requested, we will adopt those rules as proposed and without discussion.[14]

A. Section 64.708 - Definitions

7. Section 64.708[15] of the proposed rules defines a number of fundamental terms. In the FNPRM, we proposed to amend our rules to adopt, inter alia, definitions of aggregator, operator services, and provider of operator services. Comments were sought on the definitions of these terms and the other terms as set forth in Section 64.708 of the proposed rules.

1. Section 64.708(b) - "Aggregator"

8. Proposal. The term "aggregator" is defined in paragraph (b) of

---

12 See FNPRM, 6 FCC Rcd at 121-122.

13 Two sets of comments have been filed in this proceeding. Comments filed in response to the NPRM will be referred to as "NPRM Comments" or "NPRM Reply Comments" as appropriate. Comments filed in response to the FNPRM will be referred to as "FNPRM Comments" and "FNPRM Reply Comments" as appropriate. In addition, the Commission has considered the issues raised in informal complaints filed with regard to operator services. Finally, the Commission will not consider comments that address issues not raised in the NPRM or FNPRM.

14 The rules requiring OSPs to ensure aggregators' compliance by contract or tariff with certain requirements were unopposed. See Section 64.703(e) (posting requirements), Section 64.704(b)(1) (call blocking), and Section 64.705(a)(5) (charges for access code calls). Commenters did not request clarification with respect to the majority of definitions proposed in Section 64.708, specifically, subsections (a), (c), (d), (f), and (h). Section 64.704(a), which requires that "800" and "950" access be unblocked, was supported by the commenters.

15 See 47 U.S.C. §226(a).

Section 64.708[16] of the proposed rules as follows: "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services."

9. Comments. Many parties submitted comments on the proposed definition of "aggregator." A number of parties filed comments stating that correctional institutions are not aggregators with respect to inmate-only phones. The parties argued that such institutions do not make these phones available to the "public" or to "transient users," but rather that these phones are only made available to persons who are involuntarily detained. The commenters note that often administrators of correctional institutions require that inmate-only phones allow only collect calls and that phone numbers for certain individuals such as judges, witnesses, and jury members be blocked.[17] They request that we either exclude correctional institutions from the definition of "aggregator" or grant them an exemption under the fraud provision of the Operator Services Act, 47 U.S.C. § 226(g).[18] There were no comments filed contrary to this position.

10. Comments filed by the Federal Executive Agencies (FEA) in response to the FNPRM stated that the proposed definition of "aggregator" did not encompass the federal executive agencies because "governmental agencies" are not included in the definition of "person" in Section 3(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(i), and the Operator Services Act did not redefine "person" to include them.[19] The FEA operate hospitals, universities, hotel-like institutions and other facilities that provide telephones to transient users.[20]

11. Additionally, many parties filed comments requesting that

---

16 See 47 U.S.C. § 226(a)(2).

17 See, e.g., FNPRM Comments of Gateway Technologies, Inc. (Gateway) at 3-4; FNPRM Reply Comments of Robert Cefail & Associates American Inmate Communications Inc. (Cefail) at 2.

18 See, e.g., NPRM Comments of the Ameritech Operating Companies. (Ameritech) at p. 3, n. 3; NPRM Comments of Southwestern Bell Telephone Company (Southwestern Bell) at 6; NPRM Comments of Pacific Bell and Nevada Bell at 4; NPRM Comments of U S West Communications (US West) at 7-8; NPRM Comments of the Bell Atlantic Telephone Companies (Bell Atlantic) at 6; FNPRM Comments of the American Public Communications Council (APCC) at 4-6; FNPRM Comments of Gateway; FNPRM Reply Comments of Chillicothe Telephone Co. at 2-3; FNPRM Reply Comments of Rochester Telephone Co.; FNPRM Reply Comments of MCI Telecommunications Corporation (MCI) at 2-3; FNPRM Reply Comments Cefail.

19 FNPRM Comments of Federal Executive Agencies at 2.

20 Id.

universities[21] and hospitals[22] be excluded from the definition of "aggregator." Generally, universities argue that they are users of communications services and not sellers of such services. They believe that their students are long-term residential users and should not be grouped with hotel patrons, travelers or hospital patients.[23] Hospitals have generally argued that they are not common carriers and, therefore, are not subject to the Commission's jurisdiction.

12. Also with respect to this definition, several parties have asked us to clarify whether it is the premises owner or the owner of the pay telephone who is responsible as the "aggregator" for compliance with the Operator Services Act. This request has been presented to us in various forms. For example, Americall Systems of Louisville (Americall) and its joint commenters suggest that the entity that owns and controls the telephone equipment should be the "aggregator" for purposes of compliance with the Operator Services Act and the Commission's rules.[24] Americall states that, in situations where the payphone owner, rather than the premises owner, controls the telephone, the payphone owner should be considered the "aggregator."[25] Contrary to this position, the National Telephone Cooperative Association (NTCA) requests that the Commission declare that it is the premises owner that is responsible for complying with the Operator Services Act and the Commission's rules.[26] NTCA argues that premises owners

---

21 See, e.g., NPRM Comments of the University of Missouri at 1-2; FNPRM Comments of the National Association of College and University Business Officers at 1; FNPRM Reply Comments of the Association of College and University Telecommunications Administrators.

22 NPRM Comments of Ohio Hospital Association; NPRM Comments of Baylor University Medical Center; NPRM Comments of Texoma Medical Center; NPRM Reply Comments of Lorain Community Hospital.

23 See, e.g., Joint NPRM Comments of The American Council on Education and the National Association of College and University Business Officers at 2; NPRM Reply Comments of Trustees of the University of Pennsylvania at 6-7.

24 See, e.g., Joint FNPRM Comments of Americall, et al., at 4.

25 Id. NYCOM Information Services, Inc. (NYCOM) takes the same position ("Without such clarification the premises owner could be considered the aggregator even though they may have no control over the payphone and no authority to ensure that the proper signage is in place."). FNPRM Comments of NYCOM at 9-10. See also NPRM Reply Comments of United Telecommunications, Inc. at 8 ("...placing the posting responsibility on the owner of the pay telephone will facilitate compliance with the Operator Services Act and will prevent premises owners from inadvertently covering up, with the signage required by the Act, other useful information on the telephone.")

26 FNPRM Comments of NTCA at 4.

who have contracts with OSPs should have to comply with these requirements; the local exchange company who leases the equipment to the premises owner has no control over the leased equipment, over the premises where that equipment is located, or over the OSP with whom the premises owner has contracted.[27]

13. Decision. After reviewing all the relevant comments and replies, we believe that the proposed definition should be adopted. We do agree with the commenters, however, that some clarification is necessary.

14. An "aggregator" has certain enumerated responsibilities under the Act and our rules, among them posting the required information on or near the telephone and ensuring that its telephones do not block "800" or "950" access. We believe that the "aggregator" is the entity that is in the position to comply with these requirements through its access to and control of the telephone equipment, a determination that must be based on the facts of each situation. Congress has made clear that pay telephone owners, hotels and other premises owners may be aggregators under the Act. Therefore, a blanket determination by the Commission regarding who the aggregator is with regard to all payphones will not help to meet our goals of ensuring the availability of consumer information and consumer choice. Instead, we will interpret the definitions broadly enough to ensure compliance with the goals of our rules and the Act. Each entity that exercises control over telephone equipment, whether through ownership of the equipment, control of access to the equipment or some other means, will be responsible as an "aggregator" under the Act and our rules. In some situations the premises owner and the pay telephone owner will be jointly responsible as "aggregators" by virtue of their joint access to and control over the telephone equipment;[28] in some situations the "provider of operator services" will also be an "aggregator" who must comply with the provisions of the Act and our rules. In order to remove any ambiguity and to avoid debate

---

27 Id. at 3-4. Another commenter requests that we clarify that the premises owner, not the owner of the equipment, is the aggregator. FNPRM Comments of Southwestern Bell at 2. The United States Telephone Association (USTA) also supports this position stating that, absent an agreement, the premises owner should be considered the aggregator when a payphone is located on private premises. FNPRM Reply Comments of USTA at 1, n.1.

28 This interpretation is consistent with the intent of the Operator Services Act. "Telephones made available to the general public include telephones in hotels, hospitals, universities, airports, and other pay telephones." S.Rep. No. 439, 101st Cong., 2d Sess. n. 2 (1990); "Aggregators include hotels and motels, hospitals, universities, airports, gas stations, pay telephone owners, and others." Id. at 10. It is clear that Congress intended that all pay telephones be covered by the legislation whether located in, for example, hotels and universities or stand-alone payphones not located in a particular premise. OSPs must ensure aggregator compliance by tariff or contract with Section 64.703(e) (posting requirements), Section 64.704(b)(1) (call blocking prohibition) and Section 64.705(a)(5) (charges for access code calls).

over who is responsible for ensuring compliance with the Act and the Commission's rules, joint aggregators will be equally responsible for complying with the Act and the rules.

15. We conclude that the definition of "aggregator" does not apply to correctional institutions in situations in which they provide inmate-only phones. We are persuaded that the provision of such phones to inmates presents an exceptional set of circumstances that warrants their exclusion from the regulation being considered herein.[29] Accordingly, inmate-only phones at correctional institutions will not be subject to any requirements under the Act or the Commission's rules.[30] Phones provided for the use of the public, however, such as those in visitation areas, would be covered by the Operator Services Act and the rules.

16. We also find that hospitals and universities are clearly within the scope of the definition of "aggregator."[31] In discussing the definition, the Senate Committee said that "[a]ggregators include hotels and motels, hospitals, universities, airports, gas stations, pay telephone owners, and others."[32]

17. In addition, we are not persuaded that the federal executive

---

29 Both the Act and the legislative history are silent with respect to the inclusion of correctional institutions within the definition of "aggregator" with regard to inmate-only phones.

30 Additionally, the carrier providing service to inmate-only phones at correctional institutions would not fall under the definition of "provider of operator services" as such service is not provided at an "aggregator" location with respect to inmate-only phones. A carrier that provides service to phones at correctional institutions that are made available to the public or to transient users would have to comply with the requirements of the Commission's Rules and the Operator Services Act.

31 "Aggregators include, for example, hotels, hospitals, airports, and universities." NPRM, 5 FCC Rcd at 4638, n.6. We will clarify that a university that allows students complete freedom in choosing their own interexchange carriers for operator service would not come within the scope of the definition. In this instance, the university is providing nothing more than would a typical apartment building wherein each tenant is responsible for choosing his or her long-distance carrier; consumers (the students) would have made their own informed choice of OSP. Additionally, we clarify that aggregators "only include persons who make telephones available for interstate calls." S.Rep. No. 439, 101st Cong., 2d Sess. 10 (1990). For example, local exchange companies (LECs) would be "aggregators" to the extent that they make telephones available to the general public or transient users for interstate calls using a provider of operator services.

32 S.Rep. No. 439, 101st Cong., 2d Sess. 10 (1990).

agencies should be excluded from the definition of "aggregator." This Commission has previously found that governmental entities are subject to its jurisdiction.[33] First, the Communications Act has conferred upon the Commission broad and expansive regulatory authority over interstate communications by wire and radio. Second, while the term "person" in the Communications Act is defined to include certain entities, there is no indication that the list is all-inclusive and that entities not specifically mentioned are to be excluded.[34] Finally, when Congress has sought to exclude governmental entities from our jurisdiction they have done so explicitly.[35] We also note that the legislative intent of Congress would be frustrated by excluding "governmental entities" from regulation under the Operator Services Act and our rules. Hence, to the extent such agencies make phones available to the public or to transient users for the placing of operator-assisted interstate telephone calls, they clearly provide the type of service contemplated by the Operator Services Act and therefore come within the statutory requirements of the Act and under the Commission's rules.

2. Section 64.708(g) and (i) - "Operator Services" and "Provider of Operator Services"

18. Proposal. The term "operator services" is defined in paragraph (g) of Section 64.708[36] of the proposed rules as follows:

---

33 Graphnet Systems, Inc., 73 FCC 2d 283 (1979) (finding that the United States Postal Service was not exempt from Commission jurisdiction due to its status as a governmental entity).

34 Additionally, the Operator Services Act and its legislative history evidence no intent to exclude governmental entities from our jurisdiction. For example, we note that Congress has defined "aggregator" to include hospitals among other entities. There has been no distinction drawn between non-governmental and governmental hospitals, and we shall not draw that distinction.

35 For example, radio stations operated by the United States are excluded from regulation under Title III of the Communications Act. The FEA, however, points to the explicit inclusion of "governmental entities" within a definition of person included in the Cable Franchise Policy and Communications Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Title VI of the Communications Act) as dispositive with regard to the issue of jurisdiction over "governmental entities." The FEA contends that when Congress wants to include governmental entities within our jurisdiction, they do so explicitly. There is no merit to this argument as the definition of "person" in Title VI of the Communications Act is for the purposes of Title VI specifically and was not meant to limit generally the definition of "person" in Title I. The fact that Congress has explicitly confirmed that a governmental entity is a "person" under Title VI does not mean a governmental entity is not also a person under the Title I definition.

36 See 47 U.S.C. § 226(a)(7).

any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than--

(1) automatic completion with billing to the telephone from which the call originated; or

(2) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

19. The term "provider of operator services" is defined in paragraph (i) of Section 64.708[37] of the proposed rules as "any common carrier that provides operator services or any other person determined by the Commission to be providing operator services."

20. Comments. A number of parties have sought clarification that "operator services" and "provider of operator services" include "bong-in-the-box," "store-and-forward,"[38] and other similar automated technologies.[39] Generally, these parties state that there is no basis for distinguishing between live or automated off-site services and the "store-and-forward" and "bong-in-the-box" devices located within telephones and PBXs.[40] HF Communications Corporation has requested that we clarify that a hotel that provides automated billing functions only to its patrons is not an OSP under the Act and our rules.[41] It argues that there are distinctions between a hotel that provides services to its patrons and OSPs that provide services to any and all aggregators -- hotels have a direct relationship with the caller and there are many more hotels than OSPs.[42]

---

37 See 47 U.S.C. § 226(a)(9).

38 "Store-and-forward" and "bong-in-the-box" devices are microprocessors located within telephones that perform automated call completion and billing services.

39 See, e.g., NPRM Comments of Com Systems, Inc. at 6-9; NPRM Reply Comments of MLD Long Distance, Inc. at 2-3; Joint NPRM Reply Comments of Operator Service Providers of America (OSPA) and NYCOM at 25-26; NPRM Reply Comments of Competitive Telecommunications Association (CompTel) at 3-4; Joint FNPRM Comments of Americall, et al. at 7-9.

40 See, e.g., Joint FNPRM Comments of Americall, et al. at 7-9.

41 Joint NPRM Reply Comments of HF Communications Corporation and Value-Added Communications, Inc. and FNPRM Reply Comments of HF Communications Corporation.

42 FNPRM Reply Comments of HF Communications Corporation at 4.

21. Decision. Sections 64.708(g) and (i) will be adopted as proposed. The legislative history of the Operator Services Act states that "operator services" include

> interstate telecommunications services that involve any assistance to a consumer to arrange for billing other than to the number from which the call was placed. This definition includes assistance provided either by a "live" person or by automation, such as voice recordings or "bong-in-a-box" services. Carriers may not escape this definition by employing a particular technology that does not involve a "live" operator.[43]

Clearly, Congress intended that automated technologies be included within the definition of "operator services" and that those who provide service through such automated technologies are "providers of operator services" under the Act and the Commission's rules. We emphasize that "store-and-forward" and "bong-in-the-box" as well as other automated technologies do not fall within the exemption to the definition of "operator services" found in Section 64.708(g)(1) of the rules.[44] We are not persuaded that a distinction should be drawn between automated billing provided by a hotel vis-a-vis similar services provided by entities that offer such services as their primary business. Hotels providing automated billing fall within the definition of "provider of operator services" and must comply with the Act and our rules.

3. Other definitions.

22. The remainder of the definitions in the proposed rules were generally supported by commenters. MCI asks that we make a technical change to Section 64.708(e), the definition of "equal access."[45] The rule as proposed would have required that "equal access" be defined as that term is used in Appendix B of the Modification of Final Judgment as amended by court orders issued prior to the effective date of the rule. The MCI modification would include only those orders issued prior to the date of enactment of the Operator Services Act, October 17, 1990.

23. Consistent with the Act, we will modify Section 64.708(e) to reflect the inclusion of only those orders amending the Modification of Final Judgment issued prior to October 17, 1990. The remainder of the definitions in Section 64.708 will be adopted as proposed. We believe that the legislative history and intent of the Act provide sufficient guidance regarding the definitions adopted and that adoption of those terms precisely

---

43 S.Rep. No. 439, 101st Cong., 2d Sess. 11 (1990).

44 This section exempts from the definition of "operator services" the provision of interstate telecommunications services from aggregator locations that are automatically completed with billing to the telephone from which the call originated. See 47 U.S.C. § 226(a)(7)(A).

45 FNPRM Comments of MCI at 3-4.

as stated in the Operator Services Act is a necessary part of our implementation process.

B. Section 64.703 - Consumer Information

1. Section 64.703(a) - OSP Requirements

24. Proposal. Section 64.703(a)[46] of the proposed rules would require OSPs to brand calls,[47] to allow consumers to terminate calls without incurring a charge before connection, and to disclose immediately to consumers certain information regarding rates and charges. These proposed rules are necessary both to allow the consumer "to make a free and knowledgeable choice among OSPs and to help avoid or resolve disputes over charges."[48]

25. Comments. The commenters generally supported the proposed requirements for OSPs.[49] Additionally, commenters generally believe that these requirements should apply to both "live" and "automated" operators.[50]

26. There is some question over the timing of the first brand. APCC asks that we clarify that the timing of the first brand should be left to the discretion of the OSP. Specifically, APCC suggests, with respect to "store-and-forward" ("S&F") technology, the first brand should occur after billing validation, that is after the bong tone.[51] MCI, on the other hand, argues that the first brand should occur prior to the bong tone because a consumer may be entering his or her billing number and not hear a brand after the bong tone.[52] APCC also asks that we clarify that the entity named in the brand is subject to agreement between the parties, should more than one party be

---

46 See 47 U.S.C. § 226(b)(1)(A), (B), (C).

47 Call branding "is the process by which an OSP audibly and distinctly identifies itself to every person who uses its operator services." NPRM, 5 FCC Rcd at 4632.

48 Id.

49 See, e.g., NPRM Comments of Capital Network System, Inc. (CNS) at 8-10 ("CNS believes that customer information sufficient to make informed choices is not only good public policy but is good business."); NPRM Comments of Ameritech at 13; NPRM Comments of US West at 3; NPRM Comments of ComTel Computer Corp. at 5.

50 See, e.g., NPRM Comments of Cleartel Communications, Inc. at 14; NPRM Comments of Com Systems, Inc. at 4, 6.

51 FNPRM Comments of APCC at 9.

52 MCI also argues that should the first brand occur after validation, there would be no distinction between the first and second brand. FNPRM Reply Comments of MCI at 4.

involved in rate-setting.[53]

27. APCC argues that the proposal to require rate disclosure, collection methods and dispute resolution practices may have to be modified with regard to S&F technology. APCC claims that because the S&F device itself may be unable to answer questions, a consumer may have to dial a separate toll-free number to obtain rate and other information. APCC requests that we modify or clarify the rule to allow competitive public payphone providers that employ S&F technology to instruct a consumer to dial a separate toll-free number for information.[54]

28. Decision. After examining the record, we believe that Section 64.703(a) should be adopted without modification. These requirements apply to both "live" operators and automated technologies. The first brand must occur "at the beginning of the call."[55] APCC asks that we allow the first brand to occur after the consumer has entered a billing number and that number has been validated. We do not believe that a brand at that time is "at the beginning of the call." For automated systems, we require that the first brand occur prior to the bong tone, since the bong tone usually signals callers to begin entering a billing number. This requirement will help ensure that consumers hear all of the branding information and have the opportunity to make an informed choice to use a particular OSP.

29. We see no reason for prohibiting parties involved in rate-setting from deciding which party will be named in the brand. However, we prohibit parties from branding in the name of another party if rates are merely modeled on or copied from that party's rates and that party has not consented to the use of its name in the brand.

30. We believe that, with regard to automated technologies only, the provision of rate and other information via the use of a separate toll-free number is a reasonable method of compliance with our rule. We caution, however, that as technology is developed that eliminates the necessity for a separate number, the use of that number should also be eliminated. We will also clarify that any rates quoted by an OSP must be exact rather than approximate. The Operator Services Act is clear that quotes for rates or charges must be for "the call"[56] not for some hypothetical call. Rates should be quoted based on the pricing of the specific call.

---

53 FNPRM Comments of APCC at 7.

54 Id. at 8.

55 See 47 U.S.C. § 226(b)(1)(A).

56 See 47 U.S.C. § 226(b)(1)(C)(i).

2. Section 64.703(b) and Section 64.703(d) - Aggregator Posting Requirements and State Requirements

31. Proposal. Section 64.703(b),[57] as proposed, would require aggregators to post on or near telephones in plain view of consumers certain information to help ensure that consumers are fully informed when choosing an OSP. This information includes i) the name, address and toll-free number of the OSP; ii) a written disclosure that, upon request, rates are available for all operator-assisted calls and that consumers have the right to use their preferred interstate common carrier and may contact that carrier for information on accessing its services, and iii) the name and address of the Common Carrier Bureau's Enforcement Division to which a consumer may direct complaints.

32. Proposed Section 64.703(d) provides that the posting requirement of 64.703(b) will not apply if state law or regulation requires an aggregator to take actions that are substantially the same as the requirements of Section 64.703(b). The purpose of this proposed rule is to avoid duplicative posting requirements and to ensure that there is adequate disclosure to consumers through either federal or state regulation.[58]

33. Comments. Commenters were generally supportive of the proposed rules.[59] NTCA requests that we declare that the Section 64.703(b) posting requirement does not apply to payphones in non-equal access areas of the country.[60] NTCA believes that such disclosure "is meaningless unless the consumer in fact has a choice of available carriers."[61] NTCA contends that in non-equal access areas payphones are only capable of accessing one interstate carrier.[62]

34. A number of parties commented on the placement of the required information. Some commenters believe that, under certain circumstances, aggregators should be allowed to hand the required information to their

---

57 47 U.S.C. § 226(c)(1)(A).

58 S.Rep. No. 439, 101st Cong., 2d Sess. 18 (1990).

59 See, e.g., NPRM Comments of CompTel at 4; NPRM Comments of MCI at 3.

60 FNPRM Comments of NTCA at 4. A number of parties commented that information that is required to be posted should be kept at a minimum both due to space considerations and replacement costs. See, e.g., NPRM Comments of US West at 6; NPRM Comments of United Telecommunications, Inc. at 8-10.

61 FNPRM Comments of NTCA at 4.

62 Id.

patrons, such as at check-in for hotel patrons and hospital patients.[63] NARUC, on the other hand, believes that the information should be attached to the phone or displayed prominently nearby so that it is certain that all potential users of the phone receive the required information.[64]

35. Some parties have requested that we provide guidance as to the meaning of "substantially the same" in Section 64.703(d) and that we look at each state's requirements and determine whether they are "substantially the same."[65]

36. Decision. After examining the record, we believe that Section 64.703(b) and Section 64.703(d) should be adopted as proposed. Consumers in non-equal access areas should be able to reach carriers that use "800" or "950" access numbers. We therefore find that all aggregator telephones, including those in non-equal access areas, are subject to the posting requirements.

37. We also want to make clear that the required information must be posted on or near all aggregator telephones. For example, it is not sufficient that the required information is posted on or near only one telephone in a hotel suite or room with more than one telephone.[66] Further, it is not sufficient that tent cards or stickers on or near a telephone merely refer the consumer to another source of information such as a pamphlet or hand-out that is not itself within plain view of the consumer.[67]

38. The posting requirement adopted in these rules is a minimum standard. State requirements that include all the information required by

---

63 Joint NPRM Comments of Telesphere Communications, Inc. (Telesphere) and National Telephone Services, Inc. (NTS) at 26. See also NPRM Comments of OSPA at 8-9; Joint NPRM Reply Comments of OSPA and NYCOM at 27-28.

64 NPRM Comments of NARUC at 9-10. See also NPRM Comments of Independent Telecommunications Network, Inc. at 2; NPRM Comments of Communications Workers of America at 7-8 ("A hospital patient arguably has major health considerations on her/his mind at check-in time, a situation guaranteeing that literature on an abstruse operator services matter simply placed in hand will go unread and unattended. A hotel guest may be occupied with business matters on arrival.")

65 NPRM Reply Comments of United Telecommunications, Inc. (United Telecom) at 9; APCC also requests that we provide guidance regarding state requirements when it is unclear that they are "substantially the same" as federal requirements. FNPRM Comments of APCC at 10.

66 "Hotels, motels and hospitals are expected to set up 'tent cards' that rest on or near the telephone in each room." S.Rep. No. 439, 101st Cong., 2d Sess. 17 (1990).

67 "This information [that aggregators are required to post] must be placed so that it is plainly visible to a caller." Id.

our rule, though the wording may be different, will be "substantially the same." Aggregators are responsible for complying with the Act and our rules. Aggregators are also responsible for reviewing and complying with any additional state requirements, where they exist.

3. Section 64.703(c) - Double Branding

39. Proposal. Section 64.703(c)[68] would require that OSPs double brand, that is, identify itself twice, for three years from the effective date of the rule. Double branding, "by emphasizing the identity of the operator service company, [would] more fully ensure that the customer has freely chosen to use that company's services."[69]

40. Comments. The majority of the commenting parties are opposed to the double branding requirement.[70] OSPA and CompTel have requested that smaller OSPs be exempted from this requirement, as it may not be technically or financially feasible for smaller OSPs.[71]. A number of commenters have asked that we clarify that double branding applies to collect calls.[72] Additionally, one party requested that we change the sunset provision of the rule to mirror that of the legislation, that is, to three years and 90 days from enactment of the legislation or through January 14, 1994.[73]

41. Decision. The Act mandates that OSPs double brand for the three-year period commencing 90 days after its enactment.[74] We will modify Section 64.703(c) to provide that OSPs must double brand through January 14, 1994 in conformance with the Act. This rule applies to all OSPs regardless of size and to all calls including collect calls. Double branding should more fully inform consumers of the identity of the OSP handling a call and that they have the right to freely choose whether to use that OSP's

---

68 See 47 U.S.C. § 226(b)(2).

69 NPRM, 5 FCC Rcd at 4632.

70 But see NPRM Comments of the Alabama Public Service Commission (PSC) at 2 ("Double branding will provide an additional opportunity for consumer identification, consumer education and consumer choice."); NPRM Comments of the Missouri Public Service Commission at 2 (supports double branding requirement "...in order to more fully ensure that the customer has freely chosen to use that company's services."); NPRM Comments of the Arkansas Public Service Commission at 5.

71 Joint NPRM Reply Comments of OSPA and NYCOM at 29-31; NPRM Reply Comments of CompTel at 4.

72 See, e.g., NPRM Comments of the Missouri Office of Public Council at 3.

73 FNPRM Comments of MCI at 3-4.

74 See note 68, supra.

services.[75]

C. Section 64.704 - Prohibition on Call Blocking

42. Proposal. Section 64.704[76] would require each aggregator to ensure that telephones presubscribed to an OSP not block "800" and "950" access number calls. OSPs are required to ensure by contract or tariff that aggregators comply with this rule. In addition, an OSP is required to withhold compensation[77] to aggregators it reasonably believes are blocking in violation of this rule. This requirement would place the burden on OSPs to ensure compliance and would subject them to penalties under the Communications Act of 1934 should they continue to pay compensation.[78]

43. Comments. In general, commenters have supported the unblocking of "800" and "950" access as required by Section 64.704(a) of the proposed rules.[79] They say that the unblocking of "800" and "950" does not present the fraud problems associated with "10XXX" unblocking.[80] Some clarification has been requested with respect to the withholding of compensation to aggregators under Section 64.704(b)(2). NYCOM Information Services, Inc. (NYCOM) believes that OSPs should not be required to withhold compensation unless they have received notification from a regulatory agency that blocking has occurred at a particular location.[81] OSPA asks us to consider other enforcement methods, including direct Commission action against aggregators or a program in which OSPs would report to the Commission and we would issue

---

75 NPRM, 5 FCC Rcd at 4632.

76 See 47 U.S.C. § 226(c)(1)(B), (b)(1)(D)-(E).

77 "'[C]ompensation' refers to any type of compensation which is paid by any means or device, including, but not limited to, indirect compensation, discounts, and payments by means other than cash." S.Rep. No. 439, 101st Cong., 2d Sess. 13 (1990).

78 S.Rep. No. 439, 101st Cong., 2d Sess. 13 (1990).

79 See, e.g., NPRM Comments of Public Telecommunications Council at 22; Joint NPRM Comments of Americall and First Phone of New England, Inc. at 15.

80 See, e.g., NPRM Comments of the American Hotel and Motel Association at 26; NPRM Comments of OSPA at 14; NPRM Comments of CNS at 13.

81 FNPRM Comments of NYCOM at 8-9; see also Joint NPRM Reply Comments of OSPA and NYCOM at 32; NPRM Comments of MCI at 5 (asking that the Commission clarify that OSPs should not pay compensation at locations where the Commission has determined that blocking has occurred). See also NPRM Comments of Cleartel Communications, Inc. at 10 (OSPS should receive notice that blocking has occurred); accord, NPRM Comments of U.S. Long Distance, Inc. at 14-15.

a Public Notice reporting blocking practices of aggregators.[82]

44. Decision. With respect to "800" and "950" access numbers, Congress has stated, as we have, that "consumers must have...the ability to choose their desired carriers and therefore must be permitted to reach those carriers by dialing the access code associated with that carrier."[83] We believe that the unblocking of "800" and "950" access is an important step in allowing consumer choice.[84]

45. The Commission will not provide notice of blocking to an OSP before the OSP is required to withhold compensation from an aggregator nor will we compile for public dissemination listings of aggregators who purportedly block. The purpose of this rule is to provide additional incentive to OSPs to ensure that aggregators do not block "800" and "950" access. We expect that OSPs will take steps necessary to ensure such compliance. The listing by the Commission of aggregators who block will neither ensure compliance nor deter an aggregator from blocking. Preparation of such a list would merely engender delay. Unlike the Commission, OSPs have direct and regular contact with aggregators. Diligent OSP monitoring and remedial action, in the form of withholding compensation, should deter blocking and help to reach the Commission's goal of providing consumers with access to their carrier of choice.

46. The Commission will make appropriate use of its forfeiture authority against offending OSPs and aggregators. Under Section 503 of the Communications Act,[85] we can impose substantial forfeitures for willful or repeated violations of the Communications Act or our rules, regulations, or orders: for common carriers subject to the Communications Act, up to $100,000 for each violation or each day of a continuing violation, up to a total of $1,000,000 for a continuing violation; and for others, up to $10,000 for each violation or day of a continuing violation, up to a total of $75,000 for a continuous violation. This Commission will not hesitate to use our forfeiture authority against violators of our rules.

---

82 NPRM Comments of OSPA at 21-22.

83 S.Rep. No. 439, 101st Cong., 2d Sess. 17 (1990). See also NPRM, 5 FCC Rcd at 4632 ("Our goal in addressing this problem is to allow all customers access to their carriers of choice through alternative access methods.")

84 The Commission initially proposed that "800," "950," and "10XXX-0+" access codes be unblocked. NPRM, 5 FCC Rcd at 4632-33. Unblocking of "10XXX" access is being considered in a separate proceeding. See note 10, supra.

85 47 U.S.C. § 503(b)(1), (2).

D. Section 64.705 - Restrictions on Charges

47. Proposal. Section 64.705(a)(1) and (2)[86] would prohibit OSPs from billing for unanswered calls in areas where equal access is available and would prohibit "knowingly" billing for such calls where equal access is not available.

48. Section 64.705(a)(3) and (4)[87] would prohibit OSPs from call splashing[88] except when the consumer specifically requests that the call be completed anyway and the consumer is informed that the bill for the call may reflect a different originating location and the consumer consents to having the call splashed. OSPs are prohibited from billing for a call that does not reflect the originating location of the call except when call splashing has been agreed to by the consumer.

49. Under Section 64.705(b),[89] aggregators are prohibited from charging more for access code calls than for calls placed using a presubscribed OSP. Consumers should not incur extra charges at aggregator telephones because they desire to use the carrier of their choice.[90] Prohibiting any additional charges for access code calls furthers this Commission's goals of ensuring consumer choice and consumer access.

50. Comments. CompTel and OSPA request that we clarify that answer supervision is only available for Feature Group (FG) D access and not in all situations from equal access end offices.[91] US West, on the other hand, states that answer supervision is available for FG B, FG C and FG D (trunk-side services), but it is not available with line-side access connections of the type that connect customer premises equipment to the local end office

---

86 See 47 U.S.C. § 226(b)(1)(F), (G).

87 See 47 U.S.C. § 226(b)(1)(H), (I).

88 "Call splashing means the transfer of a telephone call from one provider of operator services to another such provider in a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location." 47 U.S.C. § 226(a)(3).

89 See 47 U.S.C. § 226(c)(1)(C). OSPs must ensure compliance with this requirement by contract or tariff. See Section 64.705(a)(5) of the proposed rules.

90 "This provision is intended to ensure that consumers are not discouraged from choosing their desired OSPs through access codes." S.Rep. No. 439, 101st Cong., 2d Sess. 18 (1990).

91 Joint FNPRM Comments of CompTel and OSPA at 3; see also NPRM Comments of International Telecharge, Inc. (ITI) at 30-31.

(e.g., PBX, private pay phone and FG A).[92] The Rock Hill Telephone Co. has argued that these requirements be tied to removal of FG A circuits in a given exchange area.[93]

51. MessagePhone, Inc. (MPI) requests that we clarify that automated message delivery services (AMDS) are permitted to charge for attempting to deliver a message. With AMDS, when a consumer receives a busy signal or no answer, the consumer is given the option automatically to leave a message for subsequent delivery. Where the consumer has accepted the service (the attempt(s) to complete the call), MPI argues it should be allowed to bill for that service.[94]

52. Decision. After review of the record, we believe that Section 64.705 should be adopted as proposed. As answer supervision is available in equal access end offices, we agree that "...there is no reason why a carrier cannot subscribe to a form of access that provides 'answer supervision' capability."[95] OSPs in equal access areas are prohibited from billing for unanswered calls. The rule clearly recognizes, however, that answer supervision is not available in non-equal access areas and requires that OSPs not 'knowingly' bill for unanswered calls in non-equal access areas. With regard to MPI's comments, we agree that a provider of AMDS should be allowed to bill for the provision of AMDS service. We wish to make clear, however, that an AMDS provider may not bill for the initial call when it is unanswered or uncompleted as provided for in Section 64.705.

53. The prohibition of splashing unless the consumer is informed and consents strikes the appropriate balance in protecting consumers from being billed for calls that do not reflect their originating points and allowing consumers to make an informed decision to have calls splashed. Finally, by prohibiting aggregators from imposing surcharges on access code calls that are not charged for calls using the presubscribed OSPs, we further ensure that consumers have the ability to choose their preferred carrier in a competitive marketplace.[96]

---

92 NPRM Comments of US West at 9.

93 NPRM Comments of the Rock Hill Telephone Company, Inc. at 4.

94 NPRM Reply Comments of MPI at 10-11. MPI also has suggested that when the initial call is not completed, it will not bill for that call. The consumer would only be billed for the AMDS service. Id.

95 S.Rep. No. 439, 101st Cong., 2d Sess. 14 (1990).

96 We note that this prohibition applies to the use of any access code including 10XXX access codes. "This prohibition on charging for the use of access codes also applies to the use of the '10XXX' code and other equal access codes." S.Rep. No. 439, 101st Cong., 2d Sess. 18 (1990).

E. Section 64.706 - Emergency Calls

54. Proposal. Section 64.706[97] of the proposed rules would require OSPs to connect emergency calls to the appropriate emergency service that serves the caller's location. While we have traditionally deferred to the states in this area because of the local nature of emergency calls,[98] the Operator Services Act requires that we establish minimum standards for the efficient routing of emergency calls by OSPs.

55. Comments. Many comments were filed with respect to this proposed rule. The National Association of Regulatory Utility Commissioners (NARUC) asked that we make clear that "alternate or more restrictive" state regulations are not preempted by the Commission's regulation.[99] A number of commenters believe that emergency service number data bases maintained by LECs should be made available to OSPs for a nominal cost[100] or at no charge.[101] In response, a number of LECs have commented that their emergency number data bases are available to OSPs, but LECs have incurred costs for collecting and compiling this information and they should be allowed to

---

97 See 47 U.S.C. § 226(d)(4)(A).

98 NPRM, 5 FCC Rcd at 4635 and FNPRM, 6 FCC Rcd at 121.

99 NPRM Reply Comments of NARUC at I(B) and FNPRM Comments of NARUC at II. See also FNPRM Comments of Intellicall, Inc. (Intellicall) at 4-5. The New York Department of Public Service recommends that 911 calls be routed into the local exchange network for immediate connection to the appropriate emergency service provider. FNPRM Comments at 1-2. The Alabama PSC has adopted a rule that requires all emergency calls be routed to the local exchange network. The Alabama PSC believes that this is a better approach than that in the proposed rule. FNPRM Comments at 4. The Public Utilities Commission of Ohio has ordered that OSPs should not receive, intercept, or attempt to process a 911 call. OSPs who do receive such calls must connect the call to a 911 dispatch service center immediately. FNPRM Comments at 2-3. The Nevada Public Service Commission requires that emergency calls be directed to the LEC "...because it will allow the customer to talk to people who are familiar with the area and who traditionally handled these calls." NPRM Comments at 7. See also FNPRM Reply Comments of New York City Department of Telecommunications and Energy at 5-9.

100 Joint FNPRM Comments of the CompTel and the OSPA at 5.

101 See, e.g., FNPRM Comments of NYCOM at 7 (rule is not equitable unless LECs are required to provide free access to emergency number databases because LECs maintain exclusive control over these databases). See also FNPRM Comments of Telesphere Limited (Telesphere) at 8-9; FNPRM Comments of ITI at 4-5; FNPRM Comments of MCI at 2.

recover these costs.[102]

56. A number of commenters requested that we clarify that OSPs should be allowed to refer emergency callers to the LEC operator for emergency services or provide emergency services by accessing the LEC operator.[103] Bell Atlantic disagrees and argues that OSPs should not be allowed to refer emergency calls back to the LEC operator;[104] this transfer would create unnecessary delay in the routing of emergency calls.[105] Additionally, some commenters believe that an OSP operator handling an emergency call should stay bridged on the line until the OSP operator is satisfied that the appropriate emergency service has responded to the call.[106]

57. With regard to the inclusion of certain dialing sequences within the rule, commenters have stated that "911" calls cannot be received by OSPs and are routed to the local network.[107] Others have asked that we include "00-" calls within the rule.[108]

58. The Bell Atlantic Companies ask that we modify the rule to allow for situations where the location from which the emergency call originates

---

102 FNPRM Reply Comments of Bell Atlantic at 1-2; FNPRM Reply Comments of US West at 5-6; FNPRM Reply Comments of Ameritech at 4-5; FNPRM Reply Comments of Southwestern Bell at 3-4; FNPRM Reply Comments of GTE Service Corporation at 3-5. United Telecom states that non-LEC entities are currently able to purchase emergency databases from Regional Bell Operating Companies. FNPRM Comments at 3.

103 See, e.g., FNPRM Comments of United Telecom at 2; FNPRM Comments of MCI at 2 (emergency calls should be routed to LECs for handling because it is primarily their responsibility).

104 FNPRM Reply Comments of Bell Atlantic at 2; see also FNPRM Reply Comments of Ameritech at 2-3.

105 FNPRM Reply Comments of Bell Atlantic at 2; see also FNPRM Reply Comments of US West at 3.

106 See, e.g., FNPRM Comments of Telesphere at 7-8; FNPRM Comments of Alabama PSC at 4; FNPRM Reply Comments of USTA at 6.

107 FNPRM Comments of US West at 4.

108 FNPRM Comments of Bell Atlantic at 2 ("because '00' calls bypass the exchange carrier's operators...and connect to the operators of the presubscribed OSP, these are the calls for which it is most important that specific handling requirements be established."); FNPRM Comments of US West at 5 ("It is conceivable that a frantic caller faced with an emergency might hit the '0' key twice and be routed to the presubscribed carrier's operator service system.").

is different from the location of the emergency.[109]

59. Decision. We reiterate that the subject of emergency calls is an area that the Commission has traditionally left to the states. We stress that we are adopting a minimum standard that is not intended to preempt state requirements.[110] Our goal in adopting a minimum standard is to ensure that OSPs receiving emergency calls efficiently route those calls to the appropriate emergency service provider. We note that this standard applies to "store-and-forward," "bong-in-a-box" and other automated technologies.

60. As a preliminary matter, we believe there is merit in the request that we modify the rule to require that, in instances where the originating call location is different from the site of the emergency and the site of the emergency is known, the call be connected to the appropriate emergency service for the reported site of the emergency. Section 64.706 will be adopted with this requested modification.

61. Many commenters have asked us to prescribe very specific requirements for OSPs handling emergency calls. The purpose of our rule is to provide a minimum standard to ensure that OSPs handle emergency calls appropriately. We require OSPs (i) to immediately connect an emergency call (ii) to the emergency service provider that responds to the type of reported emergency (iii) at the site of the emergency, if known, or, if not known, to the originating location of the emergency call. It is not necessary to prescribe specific rules for an OSP to meet its responsibilities. We note that some commenters have stated that emergency number databases are available from LECs; one commenter has even stated that it has developed its own database.[111] While not reaching the issue of charges by LECs for emergency number databases and updates to such databases, we believe that provision of these databases by LECs to others is important. States may adopt rules that go beyond our standard.

62. We have modified the rule to exclude specific examples of dialing sequences that might initiate an emergency call. All emergency calls, no matter how initiated, are covered by our rule. It is important that OSPs receiving an emergency call be able immediately to connect that call to the appropriate emergency service at the appropriate location.

---

109 For example, "a call from a cellular customer reporting an emergency ... passed on the road." FNPRM Comments of Bell Atlantic at 2; accord, FNPRM Reply Comments of USTA at 6-7.

110 See S.Rep. No. 439, 101st Cong., 2d Sess. 18 (1990). ("The purpose of this provision is simply to ensure that the telephones supplied by aggregators allow the consumer to obtain access to all the emergency services provided according to State regulation or practices. This provision is not intended to preempt State authority over the routing and handling of emergency calls.")

111 FNPRM Comments of CNS at 7.

F. Section 64.707 - Public Dissemination of Information

63. Proposal. We proposed in Section 64.707[112] that each OSP make available, upon request, written information that describes its own services, recent changes to those services, and services and trends in the industry as a whole. Descriptions of any recent changes in the choices available to consumers in the operator services market and the methods by which consumers may exercise those choices were to be included in the information.

64. Comments. Many parties are concerned that our requirement for the inclusion of descriptions of services and trends in the industry as a whole will subject them to a panoply of legal problems. For example, parties contend that the provision of this information 1) could subject them to potential liability for libel, misrepresentation, and other business torts;[113] 2) could subject them to allegations of anticompetitive activity, trade libel, or other actionable wrongs;[114] and 3) is a prohibited information service under the Modification of Final Judgment.[115] Instead, commenters believe that they should provide information only with respect to their own services and that the Commission should provide information with respect to the industry as a whole.[116] Still other parties have stated that the rule is vague and that the Commission should prescribe the information that should be made available by OSPs to consumers.[117] Intellicall requests that the Commission adhere to its "traditional practice of imposing reporting and dissemination requirements only on carriers of a certain size."[118] Smaller OSPs should not be required to comply with Section 64.707, it argues.

65. Decision. After a complete review of the record, we adopt Section 64.707 as proposed. The Act requires that this Commission "establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market."[119] We note that Congress requires that we establish a policy that requires OSPs to inform consumers about the "market"

---

112 See 47 U.S.C. § 226(d)(4)(B).

113 FNPRM Comments of NYCOM at 5.

114 FNPRM Comments of MCI at 3.

115 FNPRM Comments of Southwestern Bell at 5.

116 See, e.g., FNPRM Comments of MCI at 3; Joint FNPRM Comments of CompTel and OSPA at 5-6; FNPRM Comments of NYCOM at 5-7.

117 See, e.g., FNPRM Comments of Telesphere at 11; FNPRM Comments of Intellicall at 7.

118 FNPRM Comments of Intellicall at 8.

119 47 U.S.C. § 226(d)(4)(B).

in general. In order that consumers are aware of changes in the marketplace and "do not become victims of future changes in the operator services market,"[120] we believe it is necessary for each OSP to provide information not only about itself, but about the market within which it is providing service. Accordingly, OSPs will be required to disseminate information, upon request, that describes their own services, recent changes in those services, and services and trends in the industry as a whole. As we stated in the FNPRM, "we do not intend that OSPs be required to publish lengthy details about their competitors' rates and services."[121] Detailed descriptions of rates, charges, and offerings of competitors were never contemplated by the Commission. Rather, the Commission would expect OSPs to make available generic descriptions of any recent changes or innovations in operator services. We believe such descriptions may be done in a fashion that complies with other applicable legal requirements.[122]

66. OSPs are more quickly aware of changes in their market than is the Commission and the requirement that they educate consumers about such changes is appropriate. It is in the interest of OSPs to provide accurate and complete information to consumers, and we do not believe that it is necessary, at this time, to dictate exactly what information should be disseminated, beyond what we have already discussed.

67. We see no reason to adopt an exception for smaller OSPs as requested by some parties. Consumers using even the smallest OSPs have the right to request and receive information regarding that OSP's own rates and services as well as general information regarding the operator services market.

G. Section 68.318 - Equipment Capabilities

68. Proposal. Section 68.318(d) of the proposed rules[123] would require

---

120 S.Rep. No. 439, 101st Cong., 2d Sess. 18 (1990). Congress is concerned that "there is a danger that future changes in the operator services market once again may cause confusion to the detriment of the public." Id. at 18-19.

121 FNPRM, 6 FCC Rcd at 121.

122 With respect to the argument that the requirement would violate the information services restriction of the MFJ, we note that matters requiring interpretation of the MFJ are properly within the jurisdiction of the district court. See NYSMSA Limited Partnership, 58 RR 2d 525, 530 (1985). However, since no use of transmission capability would be required to comply with the Act, it is unclear how the MFJ is implicated.

123 The rule as originally proposed in the NPRM would have required both new equipment and existing equipment to provide access via all access methods (Section 68.318(d)(1) and Section 68.318(d)(2), respectively). We considered those NPRM comments addressing the original Section

that aggregator equipment or software manufactured or imported on or after April 17, 1992, be technologically capable of providing access to OSPs via equal access codes, that is, via 10XXX access codes.[124]

69. Comments. Commenters were generally supportive of the proposed rule.[125] CompTel stated that this requirement should be subject to a fraud investigation under Section 226(g) of the Act.[126] The North American Telecommunications Association (NATA), while supporting the proposed rule, suggested that we limit the requirement to the 10XXX access code for the April 17, 1992 deadline and not include access codes that have not been approved by the Commission.[127]

70. Decision. The Act mandates that aggregator software and equipment manufactured or imported on or after April 17, 1992, be technologically capable of providing access to OSPs via equal access codes. The Commission finds merit in the request that it limit the equipment capabilities requirement to 10XXX capability for the 1992 deadline. The Commission expects aggregator equipment that is the subject of the rule to be technologically capable of providing access via the 10XXX access code. The Commission will address issues relating to fraud and unblocking of the 10XXX access code in a separate proceeding.[128]

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

71. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

72. **Need and purpose of this action.** This Report and Order adopts regulations to implement the Telephone Operator Consumer Services Improvement Act of 1990, Pub. L. No. 101-435, 104 Stat. 986 (1990). The adopted rules

---

68.318(d)(1), as that section is similar to the proposal for equipment capabilities contained in the FNPRM.

124 See 47 U.S.C. § 226(f). An 'equal access code' "means an access code that allows the public to obtain an equal access connection to the carrier associated with that code." 47 U.S.C. § 226(a)(6).

125 See, e.g., NPRM Comments of APCC at 87; NPRM Comments of CNS at 18; NPRM Comments of American Telephone and Telegraph Company at 10-11; NPRM Comments of ITI at 25-26; Joint NPRM Comments of Telesphere and NTS at 82; NPRM Comments of United Telecom at 10-11; FNPRM Comments of American Hospital Association.

126 NPRM Reply Comments of CompTel at 7.

127 NPRM Reply Comments of NATA at 5-8.

128 Access/Compensation NPRM, CC Docket No. 91-35, FCC 91-53, 56 Fed. Reg. 11,136 (1991).

are intended to protect consumers from unfair and deceptive practices related to their use of operator services to place interstate telephone calls and to ensure that consumers have the opportunity to make informed choices in making such calls.

73. **Summary of the issues raised by the public comments in response to the Initial and Further Initial Regulatory Flexibility Analysis.** There were no comments submitted in response to the Initial or Further Regulatory Flexibility Analyses that are relevant to the rules adopted herein.

74. **Significant alternatives considered and rejected.** The Notice of Proposed Rule Making (NPRM) and Further Notice of Proposed Rule Making (FNPRM) in this proceeding offered many proposals. The commentors supported the basic thrust of this proceeding, with many suggesting modifications to the Commission's proposals. The Commission considered all of the alternatives presented in the proceeding and considered all of the timely filed comments directed to the various issues in the NPRM and FNPRM. After carefully weighing all aspects of the issues and comments in this proceeding, the Commission has taken the most reasonable course of action under the mandate of the Operator Services Act.

VII. ORDERING CLAUSES

75. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, 226, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 226, 303(r), that Parts 64 and 68 of the Commission's Rules, 47 C.F.R. Parts 64 and 68, ARE AMENDED as set forth in Appendix C.

76. IT IS FURTHER ORDERED that the Motion for Supplemental Notice of Proposed Rulemaking filed on August 14, 1990 by the American Public Communications Council IS DENIED; the Request for Short Extension of Time filed on October 3, 1990 by the American Public Communications Council IS DENIED; the Request for Extension of Time filed on October 4, 1990 by the Operator Service Providers of America IS DENIED.

77. IT IS FURTHER ORDERED that the Motion to Accept Late-Filed Comments filed on September 10, 1990 by the People of the State of California and the Public Utilities Commission of California IS GRANTED; the Motion to Accept Late Filing filed on October 1, 1990 by the American Public Communications Council IS GRANTED; the Motion to Accept Late Filed Comments filed on January 23, 1991 by International Telecommunications Service, Inc. IS GRANTED.

78. IT IS FURTHER ORDERED that this Report and Order will be effective thirty (30) days after publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

List of Commenters

NPRM Comments

1. Alabama Public Service Commission
2. Americall Systems of Louisville and First Phone of New England, Inc.
3. American Council on Education and National Association of College and University Business Officers
4. American Cyanamid Company
5. American Hospital Association
6. American Hotel and Motel Association
7. American Public Communications Council
8. American Telephone and Telegraph Company
9. Ameritech Operating Companies
10. Arkansas Public Service Commission
11. Association of College & University Telecommunications Administrators
12. ARCO
13. Baylor University Medical Center
14. Bell Atlantic Telephone Companies
15. BellSouth Telephone Companies
16. Call Technology Corporation
17. Capital Network System, Inc.
18. Central Telephone Company
19. Clearltel Communications, Inc.
20. Colorado Office of Consumer Counsel and National Association of State Utility Consumer Advocates
21. Colorado Public Utilities Commission
22. Colorado State University
23. Communications Workers of America
24. Competitive Telecommunications Association
25. ComTel Computer Corp.
26. Com Systems, Inc.
27. Consolidated Papers, Inc.
28. Contel Asc
29. Contel Corporation
30. Credit Card Calling Systems, Inc.
31. Dallas-Fort Worth Hospital Council
32. Robert H. Daniels
33. John M. Dollar
34. Emerson
35. Federation of American Health Systems
36. Fisher-Titus Medical Center
37. Florida Public Service Commission
38. Georgia Hospital Association
39. Edmund Goppelt
40. GTE Service Corporation
41. Healthcare Information and Management Systems Society
42. The Hertz Corporation
43. Hewlett Packard Company
44. Holiday Inn Airport/South

45. Holiday Inn Dallas Downtown
46. Holiday Inn-Downtown
47. Holiday Inn North (Colorado Springs, CO)
48. Holiday Inn North (Jackson, MS)
49. Holiday Inn-Park Central
50. Holiday Inn Powers Ferry
51. Holiday Inn Scottsdale
52. Holiday Inn Southwest
53. Holiday Inn I-10 West/Gessner
54. Hospital Corporation of America
55. Independent Coin Payphone Association
56. Independent Telecommunications Network, Inc.
57. International Communications Association
58. International Operators, Inc.
59. International Telecharge, Inc.
60. Robert V. Lang
61. Mankato Citizens Telephone Company
62. Maryland People's Counsel
63. MCI Telecommunications Corporation
64. MessagePhone, Inc.
65. Gerald A. Michaelson
66. Millicom Telecommunications Services, Inc.
67. Missouri Office of Public Counsel
68. Missouri Public Service Commission
69. Missouri Telephone Company
70. Mr. Pride Car Wash
71. MLD Long Distance, Inc.
72. National Association of Regulatory Utility Commissioners
73. National Telephone Cooperative Association
74. Ken Nelson & Company
75. Nevada Public Service Commission
76. New York City Department of Telecommunications
77. New York State Department of Public Service
78. New York University
79. North American Telecommunications Association
80. NYCOM Information Services, Inc.
81. NYNEX Telephone Companies
82. Ohio Hospital Association
83. Operator Service Providers of America
84. Pacific Bell and Nevada Bell
85. Parkland Memorial Hospital
86. People of the State of California and the Public Utilities Commission of the State of California
87. Public Service Commission of Wyoming
88. Public Telecommunications Council
89. Public Utility Commission of Texas
90. Debra M. Riggenbach
91. Roanoke & Botetourt Telephone Co.
92. Rock Hill Telephone Company, Inc.
93. Rodeway Inn-Jacksonville, FL
94. Southwestern Bell Telephone Company
95. Stanford Telephone Service Consumers and Jotham S. Stein

96. The Stanley Works
97. B.T. Stimmel
98. Strategic Telecom, Inc.
99. Telecommunications Research and Action Center and Consumer Action
100. Telesphere Communications, Inc. and National Telephone Services, Inc.
101. Texoma Medical Center
102. United Artists Payphone Corporation
103. United Inns, Inc. (Electronics Division)
104. United Inns, Inc. (Far West Regional Office)
105. United Inns, Inc. (Gary Hotels Courts, Inc.)
106. United Inns, Inc. (Kizer Motel Courts, Inc.)
107. United Inns, Inc. (Transcontinental Motor Hotels, Inc.)
108. United States Telephone Association
109. United Telecommunications, Inc.
110. University of Missouri
111. University of Pittsburgh
112. U.S. Fiberline Communications, Inc.
113. U.S. Intelco Networks, Inc.
114. U.S. Long Distance, Inc.
115. U S West Communications
116. Various Individuals
117. Washington University
118. Washington Utilities and Transportation Commission
119. Wisconsin Hospital Association

NPRM Reply Comments

1. Air Line Pilots Association
2. American Airlines
3. American Federation of Grain Millers
4. American Hotel & Motel Association
5. American Public Communications Council
6. American Sterling
7. American Telephone and Telegraph Company
8. Ameritech Operating Companies
9. Arvig Telephone Co.
10. Ashland Chemical, Inc.
11. Asten Forming Fabrics, Inc.
12. Association of Independent Airmen
13. Bell Atlantic Telephone Companies
14. Baylor Medical Center at Waxahachie
15. BellSouth Telephone Companies
16. The BFGoodrich Company
17. California State University
18. Capital Network System, Inc.
19. Caterpillar Inc.
20. Central Telephone Company
21. Children's Medical Center of Dallas
22. ClearTel Communications, Inc., Call Technology Corporation, U.S. Long Distance, Inc. and ComTel Computer Corp.
23. The Coleman Company, Inc.

24. Colonial Insurance Company of California
25. Colorado Office of Consumer Counsel and National Association of State Utility Consumer Advocates
26. Competitive Telecommunications Association
27. Communication Workers of America
28. Concord Telephone Company
29. Cowen & Company
30. Credit Card Calling Systems, Inc.
31. CyCare Systems, Inc.
32. Cypress Industrial Minerals Company
33. Dallas Rehabilitation Institute
34. Denison University
35. Dewey Electronics Corporation
36. Dow Chemical U.S.A.
37. 800-Cocaine
38. Ellensburg Telephone Company
39. Frederick & Warinner
40. GenCorp.
41. Good Samaritan Hospital
42. H&C Road Boring & Tunneling, Inc.
43. Hadson Power Systems
44. HF Communications Corporation and Value-Added Communications, Inc.
45. Hubinger
46. Huguley Memorial Medical Center
47. Independent Coin Payphone Association
48. Integon Insurance
49. International Brotherhood of Electrical Workers
50. International Communications Association
51. International Telecharge, Inc.
52. Iowa Utilities Board
53. Kimberly-Clark Corporation
54. Kintronix, Inc.
55. Lorain Community Hospital
56. John P. McGuffee and Associates
57. MCI Telecommunications Corporation
58. MessagePhone, Inc.
59. Michigan Public Service Commission Staff
60. Millicom Telecommunications Services, Inc.
61. Missouri Office of the Public Counsel
62. Missouri Public Service Commission
63. Mitel, Inc.
64. MLD Long Distance, Inc.
65. Molalla Telephone Company
66. Monitor Cooperative Telephone Co.
67. National Association of Regulatory Utility Commissioners
68. National Telephone Cooperative Association
69. NatureMost Laboratories
70. NCR Corporation
71. Nihon Kohden America, Inc.
72. North American Telecommunications Association
73. NYNEX Telephone Companies

74. Operator Service Providers of America and NYCOM Information Services, Inc.
75. Pacific Bell and Nevada Bell
76. Pacific Lutheran University
77. Public Service Commission of Wisconsin
78. Public Telecommunications Council
79. Public Utility Commission of Oregon
80. St. Paul Medical Center
81. Scio Mutual Telephone Association
82. The 1625 Massachusetts Avenue N.W., Corp.
83. Southwestern Bell Telephone Company
84. Stanford Telephone Service Consumers and Jotham S. Stein
85. Stanford University
86. Telesphere Communications, Inc.
87. Textron
88. Trumball Memorial Hospital
89. Trustees of the University of Pennsylvania
90. Unisys Corporation
91. United Artists Payphone Corporation
92. United States Telephone Association
93. United Telecommunications, Inc.
94. Various Individuals
95. Vencor Hospital Dallas
96. Weight Watchers International, Inc.
97. Wetterau Incorporated
98. Yelm Telephone Company

FNPRM Comments

1. Alabama Public Service Commission
2. Americall Systems of Louisville, Cleartel Communications, Inc., First Phone of New England, Inc. and Long Distance Service of Washington, Inc.
3. American Hospital Association
4. American Public Communications Council
5. American Telephone and Telegraph Company
6. Bell Atlantic Telephone Companies
7. Capital Network System, Inc.
8. Central Telephone Company
9. Competitive Telecommunications Association and Operator Service Providers of America
10. Equicom Communications, Inc.
11. Federal Executive Agencies
12. Gateway Technologies, Inc.
13. Healthcare Information and Management Systems Society
14. Intellicall, Inc.
15. International Telecharge, Inc.
16. International Telecommunications Service, Inc.
17. MCI Telecommunications Corporation
18. National Association of College and University Business Officers
19. National Association of Regulatory Utility Commissioners

20. National Telephone Cooperative Association
21. New York State Department of Public Service
22. NYCOM Information Services, Inc.
23. NYNEX Telephone Companies
24. Public Utilities Commission of Ohio
25. RCI Network Services, Inc. and RCI Long Distance, Inc.
26. Southwestern Bell Telephone Company
27. Telesphere Limited
28. Various Individuals
29. United States Telephone Association
30. United Telecommunications, Inc.
31. University of Wisconsin-Stevens Point
32. U S West Communications, Inc.

FNPRM Reply Comments

1. Americall Systems of Louisville, Cleartel Communications, Inc., First Phone of New England, Inc. and Long Distance Service of Washington, Inc.
2. American Public Communications Council
3. American Telephone and Telegraph Company
4. Ameritech Operating Companies
5. Association of College and University Telecommunications Administrators
6. Bell Atlantic Telephone Companies
7. BellSouth Telephone Companies
8. Capital Network System, Inc.
9. Robert Cefail & Associates American Inmate Communications Inc.
10. Chillicothe Telephone Company
11. Equicom Communications, Inc.
12. HF Communications Corporation
13. GTE Service Corporation
14. International Telecharge, Inc.
15. MCI Telecommunications Corporation
16. New York City Department of Telecommunications and Energy
17. Rochester Telephone Corporation
18. Southwestern Bell Telephone Company
19. Telesphere Limited, Inc.
20. Various Individuals
21. United Methodist Church-Wisconsin Conference (Southwest District)
22. United States Telephone Association
23. U S West Communications, Inc.

APPENDIX B

THE TELEPHONE OPERATOR CONSUMER SERVICES IMPROVEMENT ACT OF 1990, as amended

Pub. L. No. 101-435, 104 Stat. 986 (1990)

*****

SEC. 3. AMENDMENT.

Title II of the Communications Act of 1934 is amended by inserting immediately after section 225 (47 U.S.C. § 225) the following new section:

"SEC. 226. TELEPHONE OPERATOR SERVICES.

"(a) Definitions.--As used in this section--

"(1) The term 'access code' means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence.

"(2) The term 'aggregator' means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.

"(3) The term 'call splashing' means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

"(4) The term 'consumer' means a person initiating any interstate telephone call using operator services.

"(5) The term 'equal access' has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the Court in its orders issued prior to the enactment of this section.

"(6) The term 'equal access code' means an access code that allows the public to obtain an equal access connection to the carrier associated with that code.

"(7) The term 'operator services' means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than--

"(A) automatic completion with billing to the telephone from which the call originated; or

"(B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

"(8) The term 'presubscribed provider of operator services' means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code.

"(9) The term 'provider of operator services' means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

"(b) Requirements for Providers of Operator Services.--

"(1) In general.--Beginning not later than 90 days after the date of enactment of this section, each provider of operator services shall, at a minimum--

"(A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

"(B) permit the consumer to terminate the telephone call at no charge before the call is connected;

"(C) disclose immediately to the consumer, upon request and at no charge to the consumer--

"(i) a quote of its rates or charges for the call;

"(ii) the methods by which such rates or charges will be collected; and

"(iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved;

"(D) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of subsection (c) and, if applicable, subsection (e)(1);

"(E) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator (i) is blocking access by means of "950" or "800" numbers to interstate common carriers in violation of subsection (c)(1)(B) or (ii) is blocking access to equal access codes in violation of rules the Commission

may prescribe under subsection (e)(1);

"(F) not bill for unanswered telephone calls in areas where equal access is available;

"(G) not knowingly bill for unanswered telephone calls where equal access is not available;

"(H) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred; and

"(I) except as provided in subparagraph (H), not bill for a call that does not reflect the location of the origination of the call.

"(2) Additional requirements for first 3 years.--In addition to meeting the requirements of paragraph (1), during the 3-year period beginning on the date that is 90 days after the date of enactment of this section, each presubscribed provider of operator services shall identify itself audibly and distinctly to the consumer, not only as required in paragraph (1)(A), but also for a second time before connecting the call and before the consumer incurs any charge.

"(c) Requirements for Aggregators.--

"(1) In general.--Each aggregator, beginning not later than 90 days after the date of enactment of this section, shall--

"(A) post on or near the telephone instrument, in plain view of consumers--

"(i) the name, address, and toll-free telephone number of the provider of operator services;

"(ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

"(iii) the name and address of the enforcement division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services;

"(B) ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and

"950" access code numbers to obtain access to the provider of operator services desired by the consumer; and

"(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

"(2) Effect of state law or regulation.--The requirements of paragraph (1)(A) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A).

*****

"(4) Additional requirements to be implemented by regulations.--The regulations prescribed under this section shall, at a minimum--

"(A) establish minimum standards for providers of operator services to use in the routing and handling of emergency telephone calls; and

"(B) establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market.

*****

"(f) Technological Capability of Equipment.--Any equipment and software manufactured or imported more than 18 months after the date of enactment of this section and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes.

"(g) Fraud.--In any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud.

APPENDIX C

RULES

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 is amended to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. § 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077, 47 U.S.C. §§ 201, 218, 226, unless otherwise noted.

2. A new Section 64.703 is added to read as follows:

§ 64.703 Consumer information.

(a) Each provider of operator services shall:

(1) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(2) permit the consumer to terminate the telephone call at no charge before the call is connected; and

(3) disclose immediately to the consumer, upon request and at no charge to the consumer,

(A) a quotation of its rates or charges for the call;

(B) the methods by which such rates or charges will be collected; and

(C) the methods by which complaints concerning such rates, charges, or collection practices will be resolved.

(b) Each aggregator shall post on or near the telephone instrument, in plain view of consumers:

(1) the name, address, and toll-free telephone number of the provider of operator services;

(2) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(3) the name and address of the Enforcement Division of the Common Carrier Bureau of the Commission (FCC, Enforcement Division, CCB, Room 6202, Washington, D.C. 20554), to which the consumer may direct

complaints regarding operator services.

(c) Additional requirements for first 3 years. In addition to meeting the requirements of paragraph (a), each presubscribed provider of operator services shall, until January 15, 1994, identify itself audibly and distinctly to the consumer, not only as required in paragraph (a)(1), but also for a second time before connecting the call and before the consumer incurs any charge.

(d) Effect of state law or regulation. The requirements of paragraph (b) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (b).

(e) Each provider of operator services shall ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (b).

3. A new Section 64.704 is added to read as follows:

§ 64.704 Call blocking prohibited.

(a) Each aggregator shall ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer.

(b) Each provider of operator services shall:

(1) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (a); and

(2) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator is blocking access to interstate common carriers in violation of paragraph (a).

4. A new Section 64.705 is added to read as follows:

§ 64.705 Restrictions on charges related to the provision of operator services.

(a) A provider of operator services shall:

(1) not bill for unanswered telephone calls in areas where equal access is available;

(2) not knowingly bill for unanswered telephone calls where equal access is not available;

(3) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred;

(4) except as provided in paragraph (3), not bill for a call that does not reflect the location of the origination of the call; and

(5) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of paragraph (b).

(b) An aggregator shall ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

5. A new Section 64.706 is added to read as follows:

§ 64.706 Minimum standards for the routing and handling of emergency telephone calls. Upon receipt of any emergency telephone call, a provider of operator services shall immediately connect the call to the appropriate emergency service of the reported location of the emergency, if known, and, if not known, of the originating location of the call.

6. A new Section 64.707 is added to read as follows:

§ 64.707 Public dissemination of information by providers of operator services. Providers of operator services shall regularly publish and make available at no cost to inquiring consumers written materials that describe any recent changes in operator services and in the choices available to consumers in that market.

7. A new Section 64.708 is added to read as follows:

§ 64.708 Definitions. As used in sections 64.703 through 64.707 and 68.318, 47 C.F.R. §§ 64.703-64.707, 68.318:

(a) the term "access code" means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence;

(b) the term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services;

(c) the term "call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or

unwillingness, is prevented from billing the call on the basis of such location;

(d) the term "consumer" means a person initiating any interstate telephone call using operator services;

(e) the term "equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered by the United States District Court on August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (D.D.C. 1982), as amended by the Court in its orders issued prior to October 17, 1990;

(f) the term "equal access code" means an access code that allows the public to obtain an equal access connection to the carrier associated with that code;

(g) the term "operator services" means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than:

(1) automatic completion with billing to the telephone from which the call originated; or

(2) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer;

(h) the term "presubscribed provider of operator services" means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code;

(i) the term "provider of operator services" means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

Part 68 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 68 is amended to read as follows:

Authority: Secs. 4, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, 48 Stat., as amended, 1066, 1070, 1071, 1072, 1073, 1076, 1077, 1087, 1094, 1098, 1102, 47 U.S.C. §§ 154, 201, 202, 203, 204, 205, 208, 215, 218, 226, 313, 314, 403, 404, 410, 602, unless otherwise noted.

2. Section 68.318 is amended by adding paragraph (d) to read as follows:

§ 68.318 Additional limitations.

*****

(d) Requirement that registered equipment allow access to common carriers. Any equipment or software manufactured or imported on or after April 17, 1992, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes. The terms used in this paragraph shall have the meanings defined in Section 64.708, 47 C.F.R. § 64.708.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991 — 281-728 40018